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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

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WILLIAM JOSEPH QUINN,

Petitioner,

vs.

GLEN E. ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the existence of an uprising is a question of fact not subject to *de novo* review, where a magistrate found numerous Provisional Irish Republican Army-created bombings and other violent activities in London and insurrection in Northern Ireland together constituted an uprising in the United Kingdom?

2. Whether the political offense exception to international extradition protects political violence that occurs within the borders of the requesting nation in the course of a domestic uprising?

3. Whether the construction of the uprising component of the political offense exception is an important question of federal law and jurisprudence that requires review by the Court?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

Petitioner, William Joseph Quinn, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered February 18, 1986, rehearing denied, April 2, 1986.

—o—

OPINIONS BELOW

The Ninth Circuit Court of Appeals entered its published opinion on February 18, 1986. The opinion is found at 783 F.2d 776 and is set out in the Appendix, App. 61. The Court of Appeals denied Petitioner's timely Petition for Rehearing on April 2, 1986; a copy of said Order is appended hereto in the Appendix, App. 15. The District Court for the Northern District of California entered its Opinion on October 3, 1983; it is set out in the Appendix, App. 16. The United States Magistrate entered his Order and Opinion on September 29, 1982; it is set out in the Appendix, App. 157.

———o———

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1). The United States Court of Appeals had jurisdiction under Title 28 United States Code, Sections 1291 and 2253.

———o———

TREATY AND STATUTES INVOLVED

The governing treaty between the United States and the United Kingdom of Great Britain and Northern Ireland is Extradition Treaty of June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 (effective January 21, 1977), which provides in pertinent part at Article V(1)(c)(i):

"(1) Extradition shall not be granted if:

. . . .

(c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character . . . ."

The Treaty is set forth in the Appendix, App. 3.

The controlling jurisdictional statute is Title 18 United States Code Section 3184, which authorizes a United States Magistrate to conduct hearings and preliminary proceedings for determinations on requests for extradition. The pertinent text is set forth in the Appendix, App. 1.

STATEMENT OF THE CASE

In this case, the United Kingdom of Great Britain and Northern Ireland seeks the extradition of Petitioner, a member of the Irish Republican Army (IRA) on charges of murder of a police constable in London on February 26, 1975 and of conspiracy to cause explosions in London between January 1, 1974 and April 3, 1975. At the extradition hearing, Petitioner invoked the political offense exception to international extradition, as well as other defenses. Petitioner contended the alleged illegal activities occurred during and were incidental to the ongoing violence created in the cause of the Irish Republican movement to achieve political independence, to remove the British presence from Northern Ireland, and to unite Ireland. Petitioner's alleged offenses, therefore, were political in character and non-extraditable.

Petitioner was arrested on September 30, 1981 in Daly City, California on a warrant for provisional arrest issued by a United States magistrate on the application of the United Kingdom of Great Britain and Northern Ireland, pursuant to 18 U.S.C. Section 3184 and the Treaty of Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 28 United States Treaties 227, Treaties and Other International Acts Series 8468 (hereinafter the "Treaty").

On March 22, 23 and 24, 1982, the magistrate conducted hearings pursuant to 18 U.S.C. Section 3184; on September 24, 1982, he issued a Certificate of Extraditability and Order of Commitment to the Secretary of State.

Petitioner sought review of the magistrate's decision by his Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. Section 2241(a). See *In re Mackin*, 668 F.2d 122, 128 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.) *cert. denied*, 454 U.S. 894 (1981); *Caplan v. Volkes*, 649 F.2d 1336, 1340 (9th Cir. 1981); *Hooker v. Klein*, 573 F.2d 1360, 1364 (9th Cir.), *cert. denied*, 349 U.S. 932 (1978). On October 3, 1983, the District Court granted the writ and ordered Petitioner's release from the extradition order on the grounds the charges constituted offenses of a political character, pursuant to the political offense exception of the Treaty, Art. V(1)(c).

On February 18, 1986, the Court of Appeals vacated the Writ of Habeas Corpus and remanded to the District Court for further proceedings. Two members held the political offense exception to extradition was inapplicable

and that Petitioner was immediately extraditable on the murder charge. The court was unanimous in remanding to the District Court for a determination of whether the statute of limitations barred extradition on the conspiracy charge. App. 135-136.

In the lead opinion, Judge Reinhardt found Petitioner's offenses did not fall within the protective ambit of the political offense exception on the ground that, as a matter of law, an uprising did not exist outside of Northern Ireland. He stated, however, "we think it quite clear that if an uprising, as that term is defined for purposes of the political offense exception, existed at the time the offenses were committed, the bombings [and murder] were incidental to that uprising." App. 121.

The two remaining members of the panel disagreed with Judge Reinhardt's uprising analysis and its application. Judge Fletcher found the acts charged were part of an overall uprising in Northern Ireland and England. She would remand to the District Court to determine the extent of Petitioner's ties to Northern Ireland. Judge Fletcher dissented from the holding that petitioner may be extradited on the murder charge. App. 156. Judge Duniway thought that genuinely revolutionary activities can take place outside the geographic boundaries of the requesting state, but agreed the political offense exception was not applicable to "the kind of activities" charged against Petitioner. App. 150.

Petitioner respectfully requests this Court to issue a Writ of Certiorari to review the controlling opinion of Judge Reinhardt and to determine whether the political offense exception bars Petitioner's extradition to the United Kingdom.

STATEMENT OF THE FACTS

The magistrate found there existed a state of severe political violence and unrest in the United Kingdom, including Great Britain, during 1974-1975, the time the alleged offenses occurred.

The history of the Irish nationalist movement is one of violent rebellion against British rule. App. 236. Before and after the 1798 rising under Wolfe Tone, the republican ideology included the tradition of "physical force," *ie;* violence, to achieve the goal of Irish independence. App. 237. In 1849 the Irish Republican Brotherhood, the immediate predecessor of what is now the Irish Republican Army, was formed in the United States by Irish ex-patriots and Irish Americans. App. 238. The history of violent activities included bombing campaigns in London, as well as in Northern Ireland. App. 239. In 1969 the Provisional Irish Republican Army (PIRA) openly advocated armed insurrection against British rule. App. 240. "It is unrebutted that the avowed purpose of the Republican movement is to replace the existing government of Northern Ireland . . . and further to effect a unification of the entire island nation." App. 255.

During the period 1974-1975, a bombing campaign staged in Northern Ireland and the London area was "for the avowed objective . . . to 'bomb the British government to the bargaining table'" and to force the withdrawal of British troops from Northern Ireland. App. 242. As compared to the 1973 campaign, "which was not conducted in Great Britain and was, in any case, isolated

and sporadic," the violence in 1974-1975 in London was intense. App. 242. There were approximately eighty-five bombings in the London area in those years. *Id.*

The magistrate further determined "[t]he level of violence in the United Kingdom" from "the many political responses undertaken by the British government." App. 244. For example, during the years in question, Northern Ireland's provincial parliament was dissolved by order of the United Kingdom prime minister; all local affairs were under British control. *Id.*

> "The actions of the British and Northern Irish authorities, while not in themselves dispositive, corroborate the testimony of defense witnesses and demonstrate that the violence was of such intensity that it brought down one government and forced its replacement to impose severe curbs on personal liberty. Accordingly, the Court finds a violent political uprising of sufficient magnitude to bring into play the political offense exception." App. 248.

Thus, the magistrate refused to limit evidence of an uprising to violent activities occurring in London, since insurrection had spread from the armed struggle in Northern Ireland and was asserted against the same sovereign. That the uprising in Northern Ireland had spread to London was factually undisputed.

The District Court properly accepted the magistrate's factual finding that there existed a state of political violence of sufficient magnitude to meet the "uprising" requirement of the political offense exception. App. 36. The United Kingdom did not challenge this finding before the District Court or the Court of Appeals. See App. 58 n. 7.

REASONS FOR GRANTING THE WRIT

1. De Novo Review And Reversal Of The Magistrate's Factual Finding Of The Existence Of An Uprising Is Not In Accord With The Applicable Decisions Of Other Courts, Is Unprecedented, And Will Lead To Lack Of Uniformity In Judicial Construction Of International Extradition Treaties.

The political offense exception in the Treaty follows long-time, widespread international practice by prohibiting extradition where the offense is one of a political character. See I.A.Shearer, Extradition in International Law 166-69 (1971); *see e.g., Ornelas v. Ruiz,* 161 U.S. 502 (1896) (Mexico); *In re Ezeta,* 62 F.972 (N.D. Cal. 1894) (Salvador); *Garcia-Guillern v. United States,* 450 F.2d 1189 (5th Cir.), *cert. denied,* 405 U.S. 989 (1972) (Peru); *Sindona v. Grant,* 619 F.2d 167 (2d Cir. 1980) (Italy); *Eain v. Wilkes,* 641 F.2d 504, 514 (7th Cir.), *cert. denied,* 451 U.S. 894 (1981) (Israel); *Ramos v. Diaz,* 179 F. Supp. 459 (S.D. Fla. 1959) (Cuba). American courts apply the "incidence test" to determine if otherwise extraditable crimes are political and therefore protected. *Id.* To invoke the political offense exception the accused must prove: 1) the existence of a violent political disturbance, such as an uprising, rebellion, insurrection or civil war; and 2) the alleged offenses were "incidental to" or "in the course of" the uprising. *See cases collected,* 61 ALR F.2d 786 (1983).

The ultimate question of whether the political offense exception bars extradition is a question of mixed law and

fact. *Ornelas v. Ruiz,* 161 U.S. at 509 (" . . . but chiefly of fact . . . .").

Whether there was a violent political disturbance in the requesting country at the time of the alleged acts, however, is a question of fact, and has been so viewed, explicitly or implicitly, by every court making the determination. *See e.g., Eain v. Wilkes, supra,* 641 F.2d at 514; *In re Doherty,* 599 F. Supp. 270 (S.D.N.Y. 1984); *In re the Requested Extradition of Desmond Mackin,* 80 Cr.Misc. 1 (S.D.N.Y. 1981), appl. dism'd *sub nom. In re Mackin,* 688 F.2d 122 (2d Cir. 1981); *In re Gonzales,* 217 F. Supp. 717, 721 (S.D.N.Y. 1963); *Escobedo v. United States,* 623 F.2d 1098 (5th Cir.) *cert. denied,* 449 U.S. 1036 (1980); *In re Ezeta, supra,* 62 F. at 972. As the Court of Appeals recognized in Petitioner's case, "American courts generally will take judicial notice of a state of uprising." App. 140-141, cases collected at n.18.

The Seventh Circuit in *Eain v. Wilkes,* explaining why the political offense exception is justiciable, specifically defined the uprising question as a question of fact.

> "The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not."
>
> . . . .
>
> When considering the political offense exception, a court need consider only whether some incidents of violence have occurred, and not whether the violence has risen to a particular level.
>
> . . . .

> In considering the presence of a political offense, the court determines whether the crime charged stemmed from political violence. To make that determination, the magistrate need look only to the facts supporting the extradition request for evidence as to whether or not violent political activity was unfolding at the time to which the facts relate. . . ."

641 F.2d at 514, 514 n.14, 516.

In *Eain*, the magistrate took evidence on the nature of conflict in the Middle East. The Seventh Circuit noted the magistrate appeared to have found the existence of a violent political conflict in Israel, since her subsequent discussion went to issues considered after determination of the existence of violent political upheaval. *Id.* at 518. Although the court suggested the nature of the Israeli conflict was "different than disturbances considered in other cases" that involve "on-going, organized battles between contending armies;" it did not disturb the magistrate's finding. *Id.* at 519. It held, "[a]bsent a direct tie between the PLO and the specific violence alleged, the act involved here ['random bombing'], without more, was not reasonably 'incidental' to a political disturbance." *Id.*

It is well established that on appeal a question of fact cannot be disturbed unless it is "clearly erroneous." *United States v. McConney,* 728 F.2d 1195, 1200 (9th Cir.), (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 101 (1985); *see* e.g., *Pullman-Standard v. Swint,* 456 U.S. 273 (1982).

The magistrate's findings here amply demonstrate that the scores of bombings and other violence in and around London in 1974-1975 were an integral part of

the Republican uprising and that the violence had spread from the main activity in Northern Ireland.

Nevertheless, here the controlling opinion by Judge Reinhardt applied a de novo standard of review to the question of whether or not an uprising existed. He concluded both lower tribunals erred in making and upholding the factual finding that an uprising existed in the United Kingdom at the time of Petitioner's alleged offense.

The opinion of Judge Reinhardt found no uprising on two grounds. First, the level of violence outside Northern Ireland was insufficient to constitute an uprising, and second, "the nationals of Northern Ireland, seeking to alter the government in that territorial entity, exported their struggle for political change across the seas to a separate geographic entity . . . ." App. 125.

The opinion transformed the magistrate's factual finding into a mixed law and fact question subject to de novo review in the following manner:

> "The district court summarized the magistrate's factual findings as to the levels of violence that existed in Northern Ireland and elsewhere in the United Kingdom at the time Quinn allegedly committed the charged offenses, and properly adopted them. However, the district court failed to analyze the magistrate's legal conclusion that because the requisite level of violence existed in Northern Ireland and because Northern Ireland is 'in a constitutional sense' a part of the United Kingdom, an uprising existed in the United Kingdom as a whole." App. 122.

Ironically, the "three distinct steps" in deciding a mixed fact-law question, as the Court of Appeals so meticulously set out in its *en banc* opinion in *United States v. McConney,* were ignored here. 528 F.2d at 1199-1200. The first step, establishment of the "basic, primary, or historical facts," is subject to deference on appeal. See also *United States v. Ippolito,* 774 F.2d 1482 (9th Cir. 1985). The second step, selection of the applicable rule of law, and the third step, application of the law to the facts, are subject to de novo review. *United States v. McConney,* 728 F.2d at 1199-1200.

No previously recognized rule of law controls the determination of whether an uprising exists. This is particularly true of a rule that would confine the rebels to the "territory in which those rising up reside;" or of a rule that would exclude from the protection of the political offense exception politically-based activities in other parts of the nation or in the locus of governmental power, such as London.

The finding that a political uprising existed in the United Kingdom at the time of the alleged offenses is one of fact not law, and should have been accorded deference on appeal. The de novo review applied a new rule, which drastically narrowed the spacial parameters of an "uprising." The ruling conflicts with all previous practice in the courts of appeal and district courts and will increase disparaties in future interpretations of international extradition treaties.

2. Imposition Of A Geographic Limitation That Narrowly Confines Domestic Uprisings to Rebel Territory and Excludes Political Violence That Occurs Elsewhere Within The Nation Severely Abrogates The Purpose Of The Political Offense Exception.

There is no precedent for imposing a geographical limitation on the uprising requirement of the political offense exception, particularly one that would confine protected political activities to specific territory within a nation's borders.

The Court of Appeals decision imposed a geographical limitation on acts constituting an uprising. Pursuant to this limitation, Judge Reinhardt found an uprising did not exist at the time Petitioner's alleged offenses occurred, because the extent of political violence in England was not sufficient to constitute an "uprising" on its own. Thus, the court imposed, as a matter of law, a new spacial limitation of geographic rather than geopolitical boundaries.

To restrict recognition of an uprising to geographic areas *within* a nation is to undermine the political purposes the exception protects. As the court noted, one of the primary purposes of the exception is to protect revolutionary activity. App. 145-146 n. 33. The exception protects freedom of political action in one's homeland, protects against foreign intervention in internal struggles for political self-determination, and recognizes the offender might not be given a fair trial in the jurisdiction to which he is returned. App. 85, 86, 90, 139 n. 14. See McCall-Smith and Masee, "The Anglo-Irish Law Enforcement Program in Historical and Political Context," Crim.L.R. 200, 201 (1975). The purposes of the political offense exception are not met if the governed cannot, without exposure to international extradition, rise up against their government if it happens to sit in another "territory." A geographic delineation of an up-

rising should not preclude acts within the political boundaries of the country that spawned the rebellion, and which asserts its sovereignty over the rebels.

In the Court of Appeals' view, a view shared by Petitioner, the political offense exception protects *domestic political violence* but not international terrorism. App. 107, 108. Historic justifications for barring the international extradition of political offenders, as well as modern concerns with checking the spread of international terrorism and bringing international terrorists to justice are the focus of Judge Reinhardt's test for the political offense exception, and in particular, its uprising component. *Id.*

As the Court of Appeals stated:

> "[t]he application of the political offense exception to acts of domestic violence comports in every respect with both the original justifications for the exception and the traditional requirements of the incidence test.
>
> . . . .
>
> . . . in cases of international terrorism we are being asked to return the accused to the government in the country where the acts were committed: frequently that is not the government the accused has sought to change." App. 108.

Therefore, the application of a narrow geographic boundary to the uprising prerequisite should not bar extradition in Petitioner's case. The undisputed evidence established the existence of an uprising, because the offenses were acts of domestic violence in connection with a struggle for political self-determination. The offenses occurred in a domestic rather than a foreign context. Judge Reinhardt's holding to the contrary has no factual basis in the record or the law and apparently is based on a misapprehension of the political status of Northern Ireland.

Petitioner submits that political violence by members of the PIRA occurring in Northern Ireland, London or both are perforce acts against their own government—the government of the United Kingdom. A violent political disturbance taking place in either Northern Ireland or England occurs within "the borders of a country or territory" known as the United Kingdom. The residents of Northern Ireland and Great Britain, if they should participate in an uprising, are all "citizens or residents" of the United Kingdom seeking to change their particular government or governmental structure. Thus when residents of Northern Ireland carry out acts of political violence in London, they are rising up in their own country. The turmoil created by the PIRA in Northern Ireland, London, or elsewhere in Great Britain was conducted in the United Kingdom by its nationals. The political reality in this case is perhaps best characterized as civil war or rebellion, activities entitled to protection as an uprising. *In re Ezeta,* 62 F. 972 (M.D. Cal. 1894). Neither logic nor precedent support the conclusion

> "that when PIRA members revolt against their British rulers in Northern Ireland, such acts are protected under the political offense exception, whereas the identical violent acts carried out against the same British rulers in London lose their protected status." App. 153-154, Fletcher, J., concurring and dissenting.

3. The Construction Of The Uprising Component Of The Political Offense Exception Is An Important Question Of Federal Law And Jurisprudence Which Significantly Affects Present And Future Construction Of International Treaties Of Extradition And Therefore Requires Review By The Court.

The Supreme Court last addressed the political offense exception to extradition in 1896. *Ornelas v. Ruiz,* 161 U.S.

502 (1896). There the Court apparently viewed the existence or not of uprising activity along the Mexican border at the time of the Mexican Revolution as a matter of fact. The focus in that case was whether the raid by "bandits", was "in aid of a political revolt, an insurrection or a civil war." *Id.* at 511. Construction of the political offense exception since *Ornelas* has yielded inconsistent results. Compare the Court of Appeal opinion here with the refusal to extradite members of the IRA accused of violent offenses in *In re Doherty,* 599 F. Supp. 270 (S.D.N.Y. 1984); *In re Mackin,* No. 180 Cr. Misc.1 (S.D.N.Y. August 13, 1981) app. dism'd, 668 F.2d 12 (2d Cir. 1981); and *In re McMullen,* No. 3-78-1899 (N.D. Cal. May 11, 1979).

In this case, the imposition of a geographical limitation that excludes from political protection acts directed at the government of the United Kingdom within its borders, and the transformation of a question of fact (the existence of an uprising) to a question of mixed law and fact subject to de novo review, will lead to lack of uniformity in the interpretation and application of the political offense exception to international extradition.

———o———

CONCLUSION

For these reasons, the Court should grant the Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated: July 1, 1986.

Respectfully submitted,

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18 U.S.C. § 3184.

Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the

surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make provision for the reciprocal extradition of offenders;

Have agreed as follows:

ARTICLE I

Each Contracting Party undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person found in its territory who has been accused or convicted of any offense within Article III, committed within the jurisdiction of the other Party.

ARTICLE II

(1) This Treaty shall apply:

(a) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and any territory for the international relations of which the United Kingdom is responsible and to which the Treaty shall have been extended by agreement between the Contracting Parties embodied in an Exchange of Notes; and

(b) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

(2) The application of this Treaty to any territory in respect of which extension has been made in accordance with paragraph (1) of this Article may be terminated by either Contracting Party giving six months' written notice to the other through the diplomatic channel.

ARTICLE III

(1) Extradition shall be granted for an act or omission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offense, if:

(a) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty;

(b) the offense is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph (1)(a) of Article II; and

(c) the offense constitutes a felony under the law of the United States of America.

(2) Extradition shall also be granted for any attempt or conspiracy to commit an offense within paragraph (1) of this Article if such attempt or conspiracy is one for which extradition may be granted under the laws of both Parties and is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty.

(3) Extradition shall also be granted for the offense of impeding the arrest or prosecution of a person who has committed an offense for which extradition may be granted

under this Article and which is punishable under the laws of both Parties by imprisonment or other form of detention for a period of five years or more.

(4) A person convicted of and sentenced for an offense shall not be extradited therefor unless he was sentenced to imprisonment or other form of detention for a period of four months or more or, subject to the provisions of Article IV, to the death penalty.

ARTICLE IV

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

ARTICLE V

(1) Extradition shall not be granted if:

(a) the person sought would, if proceeded against in the territory of the requested Party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State; or

(b) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested Party; or

(c) (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character, or

(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or [sic] punish him for an offense of a political character.

(2) Extradition may be refused on any other ground which is specified by the law of the requested Party.

ARTICLE VI

If the person sought should be under examination or under punishment in the territory of the requested Party for any other offense, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

ARTICLE VII

(1) The request for extradition shall be made through the diplomatic channel, except as otherwise provided in Article XV.

(2) The request shall be accompanied by:

(a) a description of the person sought, his nationality, if known, and any other information which would help to establish his identity;

(b) a statement of the facts of the offense for which extradition is requested;

(c) the text. if any, of the law

(i) defining that offense;

(ii) prescribing the maximum punishment for that offense; and

(iii) imposing any time limit on the institution of proceedings for that offense;

and

(d) (i) where the requesting Party is the United Kingdom, a statement of the legal provisions which establish the extraditable character of the offense for which extradition is requested under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies by virtue of sub-paragraph 1(a) of Article II;

(ii) where the requesting Party is the United States of America, a statement that the offense for which extradition is requested, constitutes a felony under the law of the United States of America.

(3) If the request relates to an accused person, it must also be accompanied by a warrant of arrest issued by a judge, magistrate or other competent authority in the territory of the requesting Party and by such evidence as, according to the law of the requested Party, would justify his committal for trial if the offense had been committed in the territory of the requested Party, including evidence that the person requested is the person to whom the warrant of arrest refers.

(4) If the request relates to a convicted person, it must be accompanied by a certificate or the judgment of conviction imposed in the territory of the requesting Party and by evidence that the person requested is the person to whom the conviction refers and, if the person was sentenced, by evidence of the sentence imposed and a statement showing to what extent the sentence has not been carried out.

(5) The warrant of arrest, or the judicial document establishing the existence of the conviction, and any deposition or statement or other evidence given on oath or affirmed, or any certified copy thereof shall be received in evidence in any proceedings for extradition:

(a) if it is authenticated in the case of a warrant by being signed, or in the case of any other original document by being certified, by a judge, magistrate or other competent authority of the requesting Party, or in the case of a copy by being so certified to be a true copy of the original; and

(b) where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom; and where the requesting Party is the United States of America, by being sealed with the official seal of the Department of State for the Secretary of State; or

(c) if it is authenticated in such other manner as may be permitted by the law of the requested Party.

ARTICLE VIII

(1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of

arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party

(2) A person arrested upon such an application shall be set at liberty upon the expiration of forty-five days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request is subsequently received.

ARTICLE IX

(1) Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.

(2) If the requested Party requires additional evidence or information to enable a decision to be taken on the request for extradition, such evidence or information shall be submitted within such time as that party shall require.

ARTICLE X

If the extradition of a person is requested concurrently by one of the Contracting Parties and by another State or States, either for the same offense or for different offenses, the requested Party shall make its decision in so far as its law allows, having regard to all the circumstances, including the provisions in this regard in any

Agreements in force between the requested Party and the requesting States, the relative seriousness and place of commission of the offenses, the respective dates of the requests, the nationality of the person sought and the possibility of subsequent extradition to another State.

ARTICLE XI

(1) The requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition.

(2) If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the territory of the requested Party within such time as may be required under the law of that Party, he may be set at liberty and the requested Party may subsequently refuse to extradite him for the same offense.

ARTICLE XII

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State—

(a) until after he has returned to the territory of the requested Party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(2) The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition.

ARTICLE XIII

When a request for extradition is granted, the requested Party shall, so far as its law allows and subject to such conditions as it may impose having regard to the rights of other claimants, furnish the requesting Party with all sums of money and other articles—

(a) which may serve as proof of the offense to which the request relates; or

(b) which may have been acquired by the person sought as a result of the offense and are in his possession.

ARTICLE XIV

(1) The requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition.

(2) Expenses relating to the transportation of a person sought shall be paid by the requesting Party. No pecuniary claim arising out of the arrest, detention, examination and surrender of a person sought under the provisions of this Treaty shall be made by the requested Party against the requesting Party.

ARTICLE XV

A request on the part of the Government of the United States of America for the extradition of an of-

fender who is found in any of the territories to which this Treaty has been extended in accordance with paragraph (1) of Article II may be made to the Governor or other competent authority of that territory, who may take the decision himself or refer the matter to the Government of the United Kingdom for their decision.

ARTICLE XVI

(1) This Treaty shall be ratified, and the instruments of ratification shall be exchanged at Washington as soon as possible. It shall come into force three months after the date of the exchange of instruments of ratification.[1]

(2) This Treaty shall apply to any offense listed in the annexed Schedule committed before or after this Treaty enters into force, provided that extradition shall not be granted for an offense committed before this Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

(3) On the entry into force of this Treaty the provisions of the Extradition Treaty of December 22, 1931[2] shall cease to have effect as between the United Kingdom and the United States of America.

(4) Either of the Contracting Parties may terminate this Treaty at any time by giving notice to the other through the diplomatic channel. In that event the Treaty shall cease to have effect six months after the receipt of the notice.

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[1] Jan. 21, 1977.

[2] TS 849; 47 Stat. 2122.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

Done in duplicate at London in the English language this 8th day of June, 1972.

For the Government of the United States of America:

/s/ W. H. Annenberg[3]

For the Government of the United Kingdom of Great Britain and Northern Ireland:

/s/ Anthony Kershaw[4]

SCHEDULE

List of offenses referred to in Article III

1. Murder; attempt to murder, including assault with intent to murder.
2. Manslaughter
3. Maliciously wounding or inflicting grievous bodily harm.
4. Unlawful throwing or application of any corrosive or injurious substance upon the person of another.
5. Rape; unlawful sexual intercourse with a female; indecent assault.
6. Gross indecency or unlawful sexual acts with a child under the age of fourteen years.
7. Procuring a woman or young person for immoral purposes; living on the earnings of prostitution.
8. Unlawfully administering drugs or using instruments with intent to procure the miscarriage of a woman.
9. Bigamy

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[3] W. H. Annenberg

[4] Anthony Kershaw

10. Kidnapping, abduction, false imprisonment.
11. Neglecting, ill-treating, abandoning, exposing or stealing a child.
12. An offense against the law relating to narcotic drugs, cannabis sativa L, hallucinogenic drugs, cocaine and its derivatives, and other dangerous drugs.
13. Theft; larceny; embezzlement.
14. Robbery; assault with intent to rob.
15. Burglary or housebreaking or shopbreaking.
16. Receiving or otherwise handling any goods, money, valuable securities or other property, knowing the same to have been stolen or unlawfully obtained.
17. Obtaining property, money or valuable securities by false pretenses or other form of deception.
18. Blackmail or extortion.
19. False accounting.
20. Fraud or false statements by company directors and other officers.
21. An offense against the bankruptcy laws.
22. An offense relating to counterfeiting or forgery.
23. Bribery, including soliciting, offering or accepting bribes.
24. Perjury; subornation of perjury.
25. Arson.
26. Malicious damage to property.
27. Any malicious act done with intent to endanger the safety of persons travelling or being upon a railway.
28. Piracy, involving ships or aircraft, according to international law.
29. Unlawful seizure of an aircraft.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2455

D.C. NO. CV 82-6688-RPA

WILLIAM JOSEPH QUINN,

Plaintiff-Appellee,

vs.

GLEN ROBINSON, UNITED STATES MARSHAL
FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Defendant-Appellant.

ORDER

(Filed April 2, 1986)

Before: DUNIWAY, FLETCHER, and REINHARDT,
Circuit Judges

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-6688 RPA

WILLIAM JOSEPH QUINN,

Petitioner,

vs.

GLEN E. ROBINSON, United States Marshal for the Northern District of California,

Respondent.

OPINION AND ORDER

(Filed October 3, 1983)

This action is before the Court on the Petition for Writ of Habeas Corpus brought by William Joseph Quinn. By his Petition, Quinn contends that he has been improperly found extraditable to the United Kingdom to stand trial on charges of murder and conspiracy by a magistrate of this judicial district. Petitioner asks that this Court issue a writ of habeas corpus releasing him from the custody imposed by the magistrate's Certificate of Extraditability and Order of Commitment.

I. PROCEDURAL HISTORY

On November 4, 1981, the United Kingdom of Great Britain and Northern Ireland, pursuant to a treaty of extradition between it and the United States, formally requested the extradition of petitioner. In October of 1981 petitioner was charged in the United Kingdom with one count of mur-

der of a police constable, three counts of sending letter bombs in the London area, two counts of causing explosions in the London area, one count of placing an explosive device in the London area, and one count of conspiracy with six other persons to cause explosions in the United Kingdom. Petitioner had been previously arrested by federal officials on September 30, 1981, in Daly City, California, on a warrant for provisional arrest. The warrant was issued by the magistrate upon application of the United States acting for and on behalf of the United Kingdom.

The magistrate conducted numerous preliminary proceedings and the hearing to determine extraditability pursuant to 18 U.S.C. section 3184.[1] On September 24, 1982, the magistrate issued a Certification of Extraditability and Order of Commitment to the Secretary of State, together with a Memorandum of Decision in support thereof, certifying that there was sufficient evidence to sustain the charges of murder and conspiracy to cause explosions against petitioner, and thus finding petitioner extraditable on these charges. The request for extradition on the other six charges had been withdrawn by the United Kingdom prior to the magistrate's hearing.

Petitioner has properly sought review of the magistrate's decision by his Petition for Writ of Habeas Corpus in the district court. *Collins v. Miller*, 252 U.S. 364, 369 (1920); *Caplan v. Volkes*, 649 F.2d 1336, 1340 (9th Cir. 1981).

II. THE TREATY BETWEEN THE UNITED KINGDOM AND THE UNITED STATES

The United States and the United Kingdom have entered into an Extradition Treaty providing for the recipro-

cal extradition of persons found within the territory of one of the nations who have been accused or convicted of certain criminal offenses committed within the jurisdiction of the other nation. Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 (hereinafter referred to as "Treaty"), Art. I. Murder and conspiracy to cause explosions, the offenses which petitioner has been charged with committing, are extraditable offenses under the Treaty. Treaty, Art. 3(1), (2).

In order to extradite an accused person from one nation to the other, there must be evidence that would justify committing the accused for trial. The determination of whether there is evidence justifying committing the accused for trial is made under the law of the nation from whom extradition is requested, as though the offense had been committed in the territory of the requested nation. Treaty, Art. VII(3); 18 U.S.C. § 3184; *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978). United States courts have interpreted this provision of a treaty as requiring a showing by the requesting party that there is probable cause to believe that the accused has committed the charged offense. *See, e.g., United States ex rel Sakaguchi v. Kaululukui*, 520 F.2d 726, 729-31 (9th Cir. 1975).

The Treaty between the United States and the United Kingdom provides certain exceptions to the extradition, notwithstanding the existence of probable cause to believe that the accused has committed the charged offense. The exceptions to extradition in issue in the present case are:

> Extradition shall not be granted if:
>
> . . . .
>
> (b) the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requested Party; or

(c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character;

. . . .

Treaty, Art. V(1).

III. PETITIONER'S CONTENTIONS

Petitioner asserted before the magistrate that there was not sufficient competent evidence to establish probable cause to believe that he had committed the crimes charged against him by the United Kingdom. Petitioner also contended that certain exceptions to extradition contained in the Treaty prevented his extradition. Specifically, petitioner asserted that prosecution for the conspiracy to cause explosions charge was barred by lapse of time, and that both the murder and conspiracy charges constituted crimes of a political character for which extradition could not be had.

In his lengthy and conscientiously prepared Memorandum of Decision, the magistrate rejected each of these contentions. By his Petition for Writ of Habeas Corpus, petitioner contends that the magistrate's rulings on these issues were legally and factually erroneous. However, petioner does not challenge the magistrate's finding that there was sufficient competent evidence to find probable cause to believe that he had committed the offense of conspiracy to cause explosions.

As will be discussed below, this Court, pursuant to the Treaty, finds that petitioner cannot be extradicted on the conspiracy to cause explosions charge or the murder charge because these charges constitute offenses of a political character. In light of this holding, the Court need

not determine whether extradition on the conspiracy charge is barred by lapse of time.

IV. FACTS

A. *Conspiracy to Cause Explosions Charge*

The United Kingdom has charged petitioner with conspiring with Edward Butler, Hugh Doherty, Brendan Dowd, Harry Duggan, Joseph O'Connell, and Shane Paul O'Doherty "to cause by explosive substances, explosions in the United Kingdom of a nature likely to endanger life or to cause serious injury to property" contrary to section 3(1)(A) of the Explosive Substances Act of 1883. The duration of the conspiracy with which petitioner is charged is January 1, 1974, to April 3, 1975.

The evidence before the magistrate regarding the conspiracy to cause explosions primarily centered around six specific bomb incidents.[2] Each incident is discussed below.

1. *The Tickle Letter Bomb*

On January 18, 1974, a letter bomb was mailed to, and received at, the residence of Bishop Gerard William Tickle in London. The bomb had been placed in a hollowed-out Holy Bible. The bomb was rendered safe. At the time of the receipt of the letter bomb Bishop Tickle was Roman Catholic Bishop to the British Armed Forces. The fingerprints found on the wrapping around the bomb were compared to the fingerprints of petitioner, and found to match.

2. *The Buzzard Letter Bomb*

On January 30, 1974, a letter bomb was sent to, and received by, Crown Court Judge John Hazley Buzzard. When Judge Buzzard began to open the parcel, it partially

exploded, causing injury to his face and hands and the loss of parts of two of his fingers. Fingerprints found on the envelope to the parcel were compared to the fingerprints of petitioner and found to match. The fingerprints of petitioner's alleged co-conspirator, O'Doherty, were also found on the wrapping around the bomb.

3. *The Aitken Letter Bomb*

On February 4, 1974, a letter bomb was sent to Sir Max Aitken, Chairman of the Daily Express newspaper, at the newspaper's offices. The parcel was received by an assistant secretary at the office, who believed the parcel looked suspicious and called a security guard. Once the security guard took the parcel it partially exploded; the officer lost most of his left hand from the explosion. Fingerprints found on a book which concealed the bomb were compared to petitioner's fingerprints and found to match. The fingerprints of O'Doherty were found on the wrapping around the bomb.

4. *The Aldershot Railway Station Bomb*

On December 20, 1974, a bomb was found on a loading platform at Aldershot Railway Station in Hampshire County. The bomb was defused. The fingerprints of alleged co-conspirators Doherty, Duggan and O'Connell were found on the bomb wrapping and mechanisms. The fingerprints of Joseph Gilhooley were also found. Gilhooley is not an alleged co-conspirator, but is a fugitive.

5. *The Kings Arms Pub Bomb*

On the evening of Saturday, December 21, 1974, a bomb was found in an attache case in the entry to the

Kings Arms Public House. The bomb was defused. The fingerprints of Gilhooley were found on the timing mechanism of the bomb.

6. *The Charco Grill Bomb*

On January 27, 1975, a bomb was found in a black bag on the front step of the Charco-Burger Grill on Heath Street in London. The bomb was defused. The bomb was wrapped in a crumpled Irish newspaper, and the fingerprints found on the newspaper matched petitioner's fingerprints.

Searches of two flats in the London area revealed bomb-making activity. Fingerprints of petitioner, fingerprints of petitioner's six alleged co-conspirators, and fingerprints of Gilhooley, were found on various items in each flat.[3] Bomb-making materials found in the flats were consistent with the materials used in the six bomb incidents.

April 4, 1975, is the date that the United Kingdom alleges in its conspiracy charge against petitioner that the conspiracy ended. That is the date petitioner was arrested in the Republic of Ireland. Though petitioner was arrested for questioning regarding 1974 offenses of kidnapping and assault, petitioner was charged, tried and convicted of membership in an outlawed organization, specifically, the Irish Republican Army (hereinafter referred to as "IRA"). Petitioner was imprisoned in Dublin until January 2, 1976, on the conviction.

B. *Murder Charge*

The United Kingdom has charged petitioner with the murder on February 26, 1975, of Police Constable Stephen

Tibble, contrary to common law. The evidence before the magistrate regarding the murder of Police Constable Tibble is summarized below.

On February 26, 1976, Police Constable Adrian Blackledge was patrolling the West Kensington area of London looking for burglary suspects. Blackledge noticed a man engaging in suspicious activity, such as looking around and changing directions. Blackledge followed the suspect for a short time but then lost sight of him.

Soon thereafter, Blackledge saw the suspect emerge from a house on Fairholme Road. Blackledge followed the suspect, and stopped him at a bus stop. Blackledge identified himself to the suspect as a police constable. The suspect identified himself as William Rogers and gave Blackledge an address which later turned out to be false. Blackledge observed the suspect to be quite nervous, and in reponse to Blackledge's questioning the suspect was unable to give the address of the house he had been in on Fairholme Road. Blackledge asked the suspect to empty his pockets; the suspect did not fully comply. The suspect then told Blackledge that he would take him to the Fairholme Road home that he had come from. The suspect began to walk away, but Blackledge stopped him and told him that he was going to be searched, either at that moment or at the police station. At that point the suspect ran.

Blackledge chased the suspect, and Blackledge's partner, who had been on a break, joined in the chase. Police Constable Stephen Tibble, who was at that time on a motorcycle and dressed in civilian clothes, observed the chase, caught up to the suspect, got off his motorcycle, and assumed a crouched position with his arms extended to stop

the fleeing suspect. The suspect pulled out a gun, shot three times at Constable Tibble, and continued to run. Police lost the suspect. Constable Tibble died of his gunshot wounds hours later.

Soon after the shooting, Blackledge described the suspect he had chased and who shot Tibble as aged 25-30, with a heavy build, slightly tanned complexion, short, straight light brown hair, and having a "mellow" Irish accent. On May 14, 1975, Blackledge was taken to the Special Criminal Court in Dublin, Republic of Ireland, where petitioner was appearing on the charge of being a member of the IRA. At that time there was a belief that petitioner may have been the person who shot Police Constable Tibble. Blackledge immediately picked out petitioner from the three persons in the courtroom as the man he had chased and who had shot Tibble. Blackledge then heard petitioner speak with an American accent, but stated that despite the accent he was certain of his identification. It should be noted that throughout these proceedings it has never been contended that petitioner is other than heavily built, having a pale complexion and dark brown hair.

The day following the Tibble murder, a search was made of a basement room on Fairholme Road as presumably the location from which the murder suspect emerged when Blackledge spotted his suspect for the second time. Evidence of bomb-making activity was found in the room. This is one of the searches, as noted earlier, where evidence of bomb-making materials similar to those used in the six bomb incidents was found, and where the fingerprints of petitioner, of all of petitioner's alleged co-conspirators except O'Doherty, and of Gilhooley were found.

On December 12, 1975, British police arrested alleged co-conspirators Butler, Doherty, Duggan and O'Connell following a six-day seige [sic] with hostages in a flat on Balcombe Street in London. A search of the flat after the arrests uncovered a number of firearms, including a revolver. The revolver was put to a ballistics test. Bullets fired from the revolver revealed rifling characteristics similar to those on the bullets recovered from Tibble's body.

Butler, Doherty, Duggan and O'Connell became known as the "Balcombe Street Four" during their trial, under the British Prevention of Terrorism Act, on charges stemming from their activity as members of an Active Service Unit of the Provisional Irish Republican Army (Hereinafter referred to as ("PIRA"). In brief, an Active Service Unit carries out the acts of violence of the PIRA.

V. THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION

As discussed, the extradition treaty between the United States and the United Kingdom provides that extradition on an offense shall not be had where the offense is regarded by the requested party as an offense of a political character. This exception to extradition is commonly referred to by courts and commentators as the "political offense exception," and the exception appears in many extradition treaties to which the United States is a party.

Petitioner contends that his extradition on both the conspiracy and murder charges is barred by the political offense exception because of the political character of each offense.

A. Jurisdiction

As an initial matter, the government asserts that courts have no jurisdiction to determine the applicability of the political offense exception because such a decision involves political questions that are more appropriately resolved by the executive branch. The government's contention has no case precedent for its support, and has been expressly rejected by two circuit courts. *In re Matter of Mackin,* 668 F.2d 122 (2nd Cir. 1981); *Eain v. Wilkes,* 641 F.2d 504 (7th Cir.), *cert. denied,* 454 U.S. 894 (1981).

Judge Friendly's reasoning behind the Second Circuit's rejection of the identical governmental contention in *Mackin* is helpful to an understanding of the judicial role with respect to the political offense exception. The rejection was based upon statutory construction and upon policy. As a matter of statutory construction, Judge Friendly explained that had Congress intended that the judicial branch have no power to decide the applicability of the political offense exception, it would have expressly stated so in its jurisdictional grant of power to the courts in 18 U.S.C. section 3184 to determine whether evidence exists to certify an individual as extraditable. *In re Matter of Mackin,* 668 F.2d at 133. In support of this conclusion Judge Friendly pointed to proposed legislation seeking to change existing law so that the decision as the applicability of the political offense exception in each case would rest with the executive branch. *Id.*

More importantly, as a matter of policy, Judge Friendly recognized the interest of the executive branch in foreign policy relations, but stated that a decision as to the applicability of the political offense exception must be made by

the judiciary, unless the exception be "eviscerated in practice in the case of extradition treaties with nations which we are allied or those whose favor we especially desire." *Id.* at 133. Judge Friendly then quoted from *In re Kaine*, 55 U.S. (14 How.) 103, 113 (1952): "extradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty, and ought not to be allowed in this country." *Mackin*, 668 F.2d at 134. In closing, Judge Friendly remarked that although the government's policy arguments in support of its position that the nation's foreign policy could be harmed where decisions as to extradition are made by the judicial branch and not the executive branch are "not without force, particularly in an age of spreading terrorism, they are not so overwhelming as to justify us in concluding that . . . the judicial officer should [not] decide whether the offense for which extradition is sought is political. Whether the national interests would be better served by the position advocated by the executive branch, which it has asked Congress to adopt . . . is for that body to determine." *Id.* at 137. Thus, until Congress determines otherwise, the liberty interest of the accused served by the determination by an independent and unbiased judiciary of whether an offense is of a political character is preeminent to the national foreign policy interest served by such a decision resting with the executive branch.

By vesting the determination of the applicability of the political offense exception in the judicial branch, decisions on extradition for political offenses have no reference to political considerations such as the favor due or not due the country seeking extradition, or the sympathy to the political position of the person whose extradition is sought. Until Congress decides that such political considerations should

be a part of the determination of whether the political offense exception precludes extradition, by vesting this decision in the executive branch, the judiciary must guardedly preserve its role in making unbiased and independent decisions on the applicability of the political offense exception.

Thus, the magistrate properly considered the applicability of the political offense exception to the offenses charged against petitioner. This Court may properly review the magistrate's decision finding that the exception applies to neither of the two offenses.

B. Requirements for Invoking the Political Offense Exception

The political offense exception to extradition applies where a crime is 'regarded by the requested party as one of a political character.' In the United States, the political offense exception is considered to encompass two categories of political offenses: the purely political offense; and, the relative political offense. 2 Hyde, *International Law Chiefly as Interpreted by the United States,* 1019, 1021 (2d rev. ed. 1945). The purely political offense is an act "directed against the state which contain[s] none of the elements of ordinary crime." Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law,* 48 Va. L. Rev. 1226, 1230 (1962) (hereinafter referred to as "Garcia-Mora"). Such offenses include treason, sedition and espionage. A relative political offense is a common crime "so connected with a political act that the entire offense is regarded as political." *Id.* at 1230-31; *see generally Eain v. Wilkes,* 641 F.2d at 512.

The English case of *In re Castioni* [1891] 1 Q.B. 149, has been the starting point for the American judiciary in its determination of the requirements for deciding whether an offense is a relative political offense and therefore not the proper subject of an extradition request. The facts presented to the Queen's Bench in *Castioni* were as follows: A crowd of residents of a Swiss town, who were angry with the decisions being made by the governing body of the town, formed to storm the palace. As the gates to the palace were broken down, a government official was killed. Castioni, among the first to enter the palace, fled to England. The Swiss government sought his extradition on the charge of murder. *Id.* at 150-51. The Court issued a writ of habeas corpus releasing Castioni from the custody ordered by a magistrate, ruling that the offense charged against Castioni, though a common crime, was an offense of a political character for which extradition could not be had. Judge Denman framed the question before the Court as:

> Whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.

Id. at 159. Judge Denman set forth the requirements for an offense to be considered of a political character:

> . . . it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as sort of an overt act in the course of acting in a political matter, a political rising, or a dispute between parties in the states, as to which it is to have the government in its hand . . . .

Id. at 156.

American courts that have been called upon to determine whether extradition is barred because an offense is of a political character have uniformly drawn from *Castioni* the two requirements that must be met. The first requirement is that there be, at the time of the charged offense for which extradition is sought, an uprising or other violent political disturbance, such as war, revolution or rebellion. *See, e.g., Garcia-Guillern v. United States,* 450 F.2d 1189, 1192 (5th Cir. 1971); *cert. denied,* 405 U.S. 989 (1972); *Eain v. Wilkes,* 641 F.2d at 518; *Sindona v. Grant,* 619 F.2d 167, 173 (2nd Cir. 1980). The first requirement will be referred to hereafter as the requirement of a "political uprising." The second requirement is that the charged offense be incidental to and in the course of the political uprising. *Garcia-Guillern,* 450 F.2d at 1192; *Eain v. Wilkes,* 641 F.2d at 518; *Sindona v. Grant,* 619 F.2d at 173.

In the present case, the magistrate held that three requirements must be satisfied for the political offense exception to prevent petitioner's extradition to the United Kingdom on the offenses charged against him. The magistrate adopted the three requirements from the decision of the magistrate that denied the extradition request of the United Kingdom for Desmond Mackin on the grounds that the offenses charged against him were of a political character. *In re Requested Extradition of Desmond Mackin,* 80 Cr. Misc. 1, Opinion at 47 (S.D.N.Y. August 13, 1981), *gov't. appeal dismissed, In re Matter of Mackin,* 668 F.2d 122. The first and third requirements imposed by the magistrate are the two requirements earlier set forth by the Court: a political uprising; and, an offense incidental to and in the course of the political uprising.[4]

The second requirement imposed by the magistrate is that the individual charged with the offense be a member of the uprising group. The Court finds that there is no precedent for imposing a membership requirement upon the political offense exception, and that extension of existing law to impose such an additional requirement to invoking the exception is unwarranted. The magistrate in the present case was therefore in error in requiring that there be a finding that petitioner be a member of an uprising group in order to invoke to political offense exception to extradition. To the extent that petitioner's asserted failure to prove membership in an uprising group caused the magistrate to reject the applicability of the political offense exception to the offenses charged against petitioner, the magistrate's ruling must be rejected.

There are many reasons that the Court must conclude that membership in an uprising group cannot be a requirement for successful invocation of the political offense exception. First, no American, or in fact English, cases have required such proof of membership. The fact of the accused's membership in an uprising group has been used as a factor in determining whether the offense was incidental to and in furtherance of the political uprising, but it has not been imposed as a requirement to invoking the political offense exception in and of itself. *See, e.g., Ramos v. Diaz,* 179 F. Supp. 459, 463 (S.D. Fla. 1959), *In re Castioni,* 1 Q.B. at 149.

The recent case of *Eain v. Wilkes* minimizes the importance of membership as a factor in determining the applicability of the political offense exception. In that case, for which there will be more detailed discussion in

a later portion of this Opinion, the accused whose extradition was sought asserted his membership in the Palestine Liberation Organization (hereinafter referred to as "PLO") as virtually conclusive on the question of the application of the political offense exception to his alleged criminal offenses. *Id.* at 519. In responding to this assertion, the court equated membership, or lack of membership, as indicating the motive of the accused, motive being an improper consideration in determining the applicability of the political offense exception. *Id.* The court noted the criticism made by commentators of the American judiciary's refusal to recognize the motivation of the accused in deciding whether extradition is barred by the political offense exception. The court quoted a comment by Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists,* 71 J. Crim. L. & Criminology 193, 203-04 (1980) (hereinafter referred to as "Lubet & Czackes"), that the interpretation of the political offense exception which rejects consideration of the motivations behind an alleged crime "may be characterized as both underinclusive and overinclusive, as it tends to exempt from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising. . . . [T]he overinclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder." *Eain v. Wilkes,* 641 F.2d at 519. Yet despite the criticisms and concerns expressed by the commentators that the American judicial approach to the political offense exception protects from extradition common criminals during a political uprising but does not protect from extradition persons acting pursuant to political motiva-

tions when there is no political uprising,[5] the court concluded "that existing law is sufficiently flexible" to avoid the abuses which concerned the commentators. *Id.* at 519. This "existing law" consists of the requirements that there be a political uprising and an offense incidental to and in the course of the uprising, *Id.* at 519-21, before extradition can be refused because the offense is of a political character. Thus, the factor of membership in an uprising group is of minimal importance to the decision of whether extradition is barred by the political offense exception.

The other reasons that membership in an uprising group should not be a requirement for invoking the political offense exception involve matters of proof. For example, the magistrate's membership prerequisite to invoking the political offense exception requires that the accused, *i.e.,* petitioner, be a member of the uprising group. However, there has been no determination that petitioner committed the offenses charged against him, (other than a probable cause determination), as such a decision is within the exclusive province of the courts of the United Kingdom. It is inconsistent to the right of the accused to maintain his innocence of the charged offenses, yet also require that the accused be a member of a group involved in a violent political uprising. A situation can clearly be envisioned, and in fact this Court is of the belief that such a situation exists in the present case, where the evidence shows that the offense was committed incidentally to and in the course of a political uprising regardless of the identity of the person who committed the offense. Whether the accused, as opposed to the person who committed the offense, is a member of the uprising group is thus irrel-

evant to the application of the political offense exception to the charged offenses.

Furthermore, the magistrate in this case required that petitioner come forward with a prima facie case with respect to each prerequisite to the political offense exception, and to ultimately prove the satisfaction of each prerequisite by a preponderance of the evidence.[6] Thus, petitioner had to prove that he was a member of a group involved in a violent political uprising. Such a requirement of proof clashes head on with petitioner's ability to assert his innocence of the charged offenses. Evidence of an accused's membership in an uprising group may well be circumstantial evidence of his guilt on the charged offense. In order to come up with the necessary evidence to meet the burden of proof regarding his membership in the uprising group, the accused may be required to waive his Fifth Amendment privilege against self-incrimination or the corresponding British testimonial privilege. The accused should not be faced with such a dilemma. The probative value of evidence that the accused was a member of an uprising group to assuring legitimate application of the political offense exception in a given case is minimal in light of the already existing requirements for invoking the exception that there be a political uprising and that the offense be incidental to and in the course of the uprising. And because the value of the evidence of membership is so minimal, a requirement of showing membership before invoking the political offense exception is not justified in light of the serious consequences such a requirement would have on the ability of the accused to maintain his innocence to the charged offenses. An accused is not

required to admit to the offense to seek the benefit of the political offense exception to extradition.

Yet another problem of proof that arises if membership in the uprising group is required to invoke the political offense exception involves the degree to which "membership" must be proved. Is membership in a formally organized group required? Must such membership be card-carrying membership? Or rather, is mere identification of the accused with the political goals of the uprising movement sufficient? The magistrate did not discuss the type of evidence required to prove membership in the uprising group. Because the Court has concluded that membership in, or a showing of membership in, the uprising group is not required to invoke the political offense exception, the Court need not resolve that matter. Suffice it to say that proof of membership is fraught with serious problems when that membership concerns those involved in a political uprising. An uprising generally has no formal organization. Membership may be difficult to prove without the testimony of the accused himself, and as noted earlier, such testimony cannot be required. And certainly the political offense exception cannot be denied to those political uprisings that are loosely organized or dispersed. Not much more can be said of the early American revolutionary movement against the Crown.

The Court concludes that proof of a political uprising, and proof that the charged offense is incidental to and in the course of the uprising, is sufficient to assure legitimate invocation of the political offense exception, and that proof of the accused's membership in an uprising group is not required. Though membership in an uprising group may

be used as evidence regarding whether the charged offense was incidental to and in the course of the political uprising, for the reasons expressed above, membership is not a proper prerequisite to application of the political offense exception. In summary, then, in order for the political offense exception to bar petitioner's extradition on either of the charged offenses of conspiracy or murder, two requirements must be met as to each offense:

(1) each charged offense must have been committed at a time of an uprising or other violent political disturbance, such as war, revolution or rebellion; and,

(2) each charged offense must have been incidental to and in the course of the uprising or violent political disturbance.

VI. THE CONSPIRACY CHARGE AS AN OFFENSE OF A POLITICAL CHARACTER

A. Existence of a Political Uprising

The magistrate found, and respondent does not here challenge,[7] that petitioner proved by a preponderance of the evidence that a state of severe violent political unrest existed in the United Kingdom, including Great Britain, at the time of the conspiracy to cause explosions charged against petitioner, and that therefore the political uprising requirement for invoking the political offense exception was met. In what are apparently the only other cases to determine the existence of a political uprising in Great Britain during a similar time period, two magistrates have also found that such an uprising existed. *In re the Matter of the Requested Extradition of Desmond Mackin,* Opinion at 83; *In the Matter of the Extradition of Peter*

Gariel John McMullen, Magistrate No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

A brief summary of the reasoning behind the magistrate's finding is helpful as background to future issues to be resolved by the Court. The magistrate traced the history of the Irish nationalist movement protesting British rule of Northern Ireland, and the historical tradition of the use of "physical force," *i.e.,* violence, as a form of protest. Notably, the Irish Republican Army had its origin in the Irish Republican Brotherhood, which was founded by Irish expatriots in the United States. During various times in the first part of the twentieth century, up through the 1960's, the IRA was responsible for violent opposition to British rule in Northern Ireland, bombings being a common form of such violent expression.

In 1969 the Provisional Irish Republican Army was formed as a splinter group from the IRA. The PIRA advocated immediate armed insurrection while the IRA, though believing in violence as a means to achieve its goals, believed that violence was not an appropriate means for attaining its goals at that time, preferring civil disobedience and social protest. A primary goal of the PIRA was and is British withdrawal from Northern Ireland.

Between 1970 and 1972 the PIRA conducted bombing campaigns that coincided with popular referendums. A major PIRA bombing campaign took place between 1974 and 1975, the time period of the bombing conspiracy charged against petitioner. The announced goals of this campaign was [sic] to 'bomb the British government to the bargaining table' and to force the withdrawal of the Brit-

ish from Northern Ireland. The PIRA also announced that it intended to bomb military, political and judicial targets.

The magistrate's decision that there existed a political uprising of sufficient magnitude to meet the first requirement of the political offense exception was based upon the level of violence in the United Kingdom in 1974 and 1975, and the British response to that violence. The incidents making up the level of violence were described by the magistrate to be the numerous bombings in the United Kingdom during that period. The magistrate particularly noted the large number of bomb incidents in the London area. Among these bomb incidents in London, a large percentage, amounting to over 50 in number, were attributed to the Active Service Unit to which the Balcombe Street Four belonged. The magistrate also noted that civilians were often affected by the bombing incidents.

B. Incidental To and In the Course Of

Since a political uprising existed during the time period of the conspiracy to cause explosions charged against petitioner, petitioner cannot be extradited to stand trial in the United Kingdom on the conspiracy charge if that offense was incidental to and in the course of a political uprising.[8]

Whether an offense for which extradition is sought was incidental to and in the course of the political uprising is determined from the evidence of the circumstances attending the crime at the time of its commission. *Garcia-Guillern v. United States,* 450 F.2d at 1192; *Ramos v. Diaz,* 179 F. Supp. at 463. As discussed earlier, neither the motive of the accused, *Eain v. Wilkes,* 641 F.2d at 519, nor of

the demanding country, *Garcia-Guillern,* 450 F.2d at 1192; *Ramos v. Diaz,* 179 F. Supp. at 463, are relevant to this determination. In accordance with its role as an independent and unbiased decision-maker, the court looks to the evidence and determines whether the acts charged against the accused were or were not connected to the political uprising. *Eain v. Wilkes,* 641 F.2d at 516. This means therefore that it is irrelevant whether the accused did or did not intend his acts to be incidental to and in the course of the uprising, but only that they were connected to the uprising. For example, the Supreme Court in *Ornelas v. Ruiz,* 161 U.S. 502, 511-12, looked to the surrounding circumstances, specifically, the character of the foray, the mode of attack, the persons killed or captured and the kind of property taken or destroyed, and not to the political intentions of those who committed the charged offenses, in determining whether the crimes involved were "in aid of" a political uprising. *Id.* at 511-12.

It should be noted that there are only a handful of reported cases which discuss the application of the political offense exception to relative political offenses, *see* Annot., 61 A.L.R. Fed. 786 (1983),[9] and few have attempted to set forth and distinguish the various factors that go toward determining the applicability of the political offense exception. The Court attempts to provide greater clarification in this Opinion.

The evidence before the magistrate applicable to this requirement for invoking the political offense exception consisted of the evidence in the United Kingdom's request for extradition that among petitioner's alleged co-conspirators were the Balcombe Street Four, and that the bombing

incidents that petitioner was allegedly involved with were attributed to the Balcombe Street Four and the Active Service Unit of the PIRA. Additionally, petitioner presented three witnesses. The first, Dr. Bell, an expert witness on the PIRA, testified about the historical use of violence, specifically bombings, by Irish nationalism movements. Dr. Bell testified as to the purpose of the PIRA bombing campaign in 1974 and 1975, and the role of Active Service Units in those bombings. He stated that the PIRA target for violence is the military, but when that target is not possible, governmental and economic targets are used. Dr. Bell further testified that individuals in an Active Service Unit often choose the specific targets. *Id.* at 43.

The second witness, Mr. Harvey, was counsel for the Balcombe Street Four. He testified that the "Four" were prosecuted under the British Prevention of Terrorism Act, an act passed in reaction to Irish nationalist acts of violence. He further testified that the case was presented as the defendants being four members of a PIRA Active Service Unit.

The third witness, Mr. Holland, was a journalist and author on the PIRA. He testified as to the motivation for the 1974 and 1975 bombings.

The government called only one witness, Mr. Peay, who testified that it was the opinion of the State Department that the bombings were not political offenses.

In deciding that the conspiracy to cause explosions offense was not incidental to and in the course of the political uprising the magistrate first stated that the relevant act to be examined was not the conspiratorial agreement,

but the overt acts in furtherance of the conspiracy, *i.e.*, the bombing incidents. This Court must disagree. Though the circumstances surrounding the bombings must be considered in determining the applicability of the political offense exception to the conspiracy charge, the conspiratorial agreement is also an important consideration. The evidence that petitioner entered into the conspiracy with persons who were members of an Active Service Unit of the PIRA is strong evidence that the bombing conspiracy was incidental to and in the course of the political uprising.

The magistrate then held that the bombings were not incidental to and in furtherance of the political uprising. His decision was based upon two separate holdings. First, petitioner failed to prove by a preponderance of the evidence that the bombings were in the *furtherance* of the political goals of the PIRA. Second, the application of the political offense exception was barred by the decision of the Seventh Circuit in *Eain v. Wilkes*. The Court finds that the above two holdings are based upon an erroneous application of the law, and that the overwhelming weight of the evidence supports a finding that the conspiracy to cause explosions charge is an offense of a political character.

In support of his decision that the bombings were not in the furtherance of the political goals of the PIRA, the magistrate cited to testimony that members of Active Service Units often acted without guidance from the PIRA hierarchy in choosing their targets, and that there was a lack of control over, and a lack of consideration of, the political effectiveness or success of actions taken by Active Service Units.[10] This Court holds that these are not proper

considerations in determining whether an offense is incidental to and in the course of a political uprising.

The magistrate phrased the second requirement for determining that an offense is of a political character as whether the offense was incidental to and *in furtherance of* the political uprising. The "in furtherance of" language comes from *Castioni.* Most American courts use the phrases "in the course of," "as part of" and "connected to" in stating this second portion of the second requirement for invoking the political offense exception. The purpose of this second portion of the requirement is found in the phrases themselves, and all should be given equivalent effect. However, the magistrate gave the phrase "in furtherance of" greater meaning than can be attributed to the other three phrases by using that phrase as a means of evaluating the political effectiveness and success of actions of an uprising group in determining the applicability of the political offense exception.

The choices of action by an uprising group are not proper considerations for the extradition court when considering the applicability of the political offense exception. As stated by Judge Denman in *Castioni:*

> . . . we cannot decide that the question [whether an offense was in the course of and as part of a political rising] merely by considering whether the act done at the moment at which it was done was a wise act in the sense of being an act which the man who did it would have been wise in doing with the view of promoting the cause in which he was engaged. . . . I do not think it would be right to limit it . . . by considering whether it was necessary at that time that the act should be done.

Castioni, 1 Q.B. at 158-59. And as Judge Hawkins noted, also in *Castioni:*

> I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but nonetheless an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as cruel and against all reason, by those who can calmly reflect upon it after the battle is over.

Id. at 167.

The applicability of the political offense exception cannot depend upon the past success or the political effectiveness of the action taken by the uprising group. The exception will or will not apply irrespective of the political savvy of the uprising group. And any judicial evaluation of such factors would be contrary to the duty of the extradition court to make independent anl unbiased decisions based upon the evidence of the circumstances of the acts the subject of the charged offense.

The magistrate's rejection of the political offense exception to the conspiracy charged against petitioner because there was evidence that Active Service Units often make decisions independent from the PIRA hierarchy is also without merit. To the extent independent decisions are made, such independence is authorized by the PIRA hierarchy. And, as earlier noted, the availability of the political offense exception should not be made to depend upon the degree of formal organization of the uprising

group or whether each act taken by the accused was formally approved by some type of command within the uprising group. "Uprisings" are generally not formally organized and the participants often act without formal directions and orders. Moreover, the emotional desire to overcome the ruling forces will often lead the participant to choose his own acts. The political exception applies regardless of the presence or absence of these considerations. The question in determining the applicability of the political offense exception is whether the offense of the accused was connected to the events constituting the political uprising, *see Eain v. Wilkes,* 641 F.2d at 516, and not whether the uprising was sufficiently organized and formal to deserve recognition.

And, finally, the magistrate's determination that petitioner did not prove that the six bombings were in the furtherance of the goals of the PIRA is contrary to the magistrate's own phrasing of the second requirement that the offense be incidental to and in furtherance of the political uprising. Notwithstanding, there is no question that the six bombings were tacitly, if not expressly, authorized by the PIRA, and were to achieve goals of the PIRA, particularly to the extent they were to bring the British to the bargaining table and were a part of the violent political uprising that the magistrate found existed in the United Kingdom.[11]

Thus, the phrase "in furtherance of" should be given no greater meaning that the phrases "in the course of," "as part of," or "in connection with." Because the phrase "in furtherance of" can implicate forward progress, which could then implicate success, the Court believes that

any of the other three phrases more appropriately express the second portion of the second requirement of the political offense exception. (As noted, the Court uses "in the course of" throughout this opinion.) There is no question that these three phrases express the intention of the *Castioni* court, the originator of the phrase "in furtherance of" in the political offense exception context.[12]

The next question before the Court is whether the application of the political offense exception to the conspiracy offense charged against petitioner should be rejected because of the *Eain v. Wilkes* decision. *Eain v. Wilkes* is a unique case in the United States law of extradition.

In *Eain v. Wilkes,* Israel sought the extradition of Abu Eain to stand trial on charges of murder, attempted murder and causing bodily harm with aggravating intent. Eain had allegedly set a bomb in a busy marketplace of the Israeli City of Tiberias. The bomb exploded, killing two young boys and injuring over 30 people. *Eain v. Wilkes,* 641 F.2d at 507. Eain asserted before the extradition court that he could not be extradited because the political offense exception in the treaty between the United States and Israel applied to his politically motivated crimes. Eain was a member of the PLO at the time of the bombing. *Id.*

The Seventh Circuit affirmed the decision of the magistrate finding the political offense exception of the treaty to be inapplicable. The Court held that Eain's anarchist-like activity was not a form of political activity protected by the political offense exception.

The court explained that the focus of the political uprising requirement is upon forms of aggression that disrupt

the political structure of a State, and not the social structure that established the government of the State. *Id.* at 520-21. Said the court:

> The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.

Id. at 521.

The *Eain* court based its decision in part upon the English case of *In re Meunier* [1894] 2 Q.B. 415. In that case the accused sought application of the political offense exception in the treaty between the United Kingdom and France to his alleged offense of causing an explosion in a military barracks. The accused admitted that he was an anarchist. The court found that as an anarchist, the political offense exception could not be applied to prevent the accused's extradition. *Id.* at 419. The court explained that an anarchist is the enemy of all governments, who directs his efforts "primarily against the general body of citizens." *Id.* For an offense to be of a political character and so exempt from extradition, "there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other." *Id.* Where

an offense is committed by one side or the other in pursuit of that object, the offense is a political one. *Id.* Where an offense is committed by an anarchist, there are not two parties each seeking to impose the government of their own choice on the other. Therefore the political offense exception cannot apply to that offense. *Id.*

The *Eain* court applied this anarchy theory to the case before it and explained: "[A]narchy presents the extreme situation of violent political activity directed at civilians . . . we are presented with a situation that solely implicates anarchist-like activity, *i.e.*, the destruction of a political system by undermining the social foundation of the government." *Eain v. Wilkes*, 641 F.2d at 521. Though the *Eain* court did not find Eain to be an anarchist, it found the offenses with which he was charged to involve anarchist-like activity. Therefore Eain's offenses did not come within the political offense exception to extradition in the treaty. Anarchist-like activity is defined by the *Eain* court as the destruction of a political system by undermining the social foundation of the government. *Eain v. Wilkes*, 641 F.2d at 521. What specific acts make up that activity would appear from the *Eain* court's decision to be indiscriminate acts of violence directed at the civilian populace of the State. Thus, *Eain v. Wilkes* holds that an offense having its impact upon the citizenry and not directly upon the government does not come within the political offense exception. *Id.*

Eain stands by itself for the propositions there enunciated. No reported American case has ever addressed this "anarchist-like activity" concept and its effect on the political offense exception. The magistrate in the present

case applied *Eain* and found that the six bombings were not incidental to the political uprising in the United Kingdom because all six bombings were directed against innocent civilians under circumstances, or at a minimum, where the perpetrators could not help but expect that civilians would be injured.

As a matter of law, the Court finds the application of the *Eain* case to the present case to prevent the political offense exception from applying to the conspiracy offense charged against petitioner to be erroneous.

First, *Eain v. Wilkes* is factually distinguishable from the present case. As the *Eain* court described the situation before it, the uprising group sought the destruction of the Israeli political structure as an incident of the expulsion of a certain population from the country, and directed its destructive efforts at a defined civilian populace. *Id.* at 520. In the present case, those participating in the violent political uprising in the United Kingdom committed their destructive acts to protest British rule in Northern Ireland, and to bring the British to the bargaining table. Any violence coming to the general civilian population was an incident to the political goals of seeking an end to British rule in Northern Ireland. This presents the exact opposite situation to that presented to the *Eain* court. Additionally, the announced intent to the bombing campaign to 'bomb the British to the bargaining table' provides the "direct link" required by the *Eain* court between the perpetrator of the acts of violence, the uprising group's political goals, and the violent acts.[13] All the evidence at petitioner's extradition hearing showed that the six bomb incidents were part of this campaign. The bombs were placed by an

Active Service Unit of the PIRA to cause the British to negotiate with the PIRA. There was no political goal to kill civilians or to eliminate a certain civilian population. The offenses had an impact directly upon the British government. The facts of *Eain*, where civilians were killed because the perpetrator did not want the population they represented to exist, are quite distinguishable from the present case. The *Eain* court acted in response to the facts it was presented with. Its holding does not apply to the case before this Court.

A second reason the Court chooses not to apply the *Eain* case to the present case is its concern that the *Eain* case may cause a court to depart from its critical role as an unbiased and independent factfinder. As noted, the *Eain* court was faced with an extreme situation that it did not want to sanction. The court's emotion in dealing with the case is reflected in its discussion regarding terrorists who commit barbarous acts and its conclusion that the political offense exception "should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere." *Id.* at 520. Such expressions of emotion have not been part of the historic function of the extradition court while determining the applicability of the political offense exception. As stated by the first United States court to rule on the applicability of the political offense exception:

> With the merits of this strife I have nothing to do. My duty will have been performed when I shall have determined the character of the crimes or offenses charged against these defendants, with respect to that conflict. During its progress, crimes may have been committed by the contending forces of the most atrocious and

> inhuman character, and still the perpetrators of such crimes escape punishment as fugitives beyond the reach of extradition. I have no authority, in this examination, to determine what acts are within the rules of civilized warfare, and what are not.

In re Ezeta, 62 F. 972, 997 (N.D. Cal. 1894).

It may well be that in a case such as *Eain* an independent and unbiased judiciary may properly determine that violence directed at a civilian population for the purpose of eliminating that civilian population contains no elements of the political activity necessary to invoke the political offense exception to extradition. In this regard it is important to note that the *Eain* court expressed great doubt that the facts before it showed the existence of a political uprising. *Eain v. Wilkes*, 641 F.2d at 520. However, an application of the *Eain* decision to the present case, where there is a historically recognized political motive behind the acts of violence, is troublesome. The role of the extradition court is to act as an independent and unbiased fact-finder, looking to the factual circumstances at the time of a violent act to determine whether it was connected to the uprising movement. Liberal application of the *Eain* decision could result in the extradition court making judgments as to the goals of a particular uprising group and the appropriateness of the acts of the uprising group. Inherent in any situation where political change is sought are conflicting opinions on the merits of the sought-after change and the methods being used to seek the change. Extradition courts must avoid becoming caught up in such controversy.

The Court does not sanction the use of violence in this case. But by including in its extradition treaties an excep-

tion to extradition where an offense is of a political character, and by the recognized interpretation of the exception as requiring some type of violent political uprising, the United States does protect from extradition persons who commit acts of violence as part of a political uprising. The advent of the popularity of terrorism raises some serious questions as to the propriety and coverage of the political offense exception in extradition treaties. Such questioning however must largely be undertaken by the executive and legislative branches of the government. A quotation appearing earlier in this Opinion is appropriately repeated here: "extradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty, and ought not to be allowed . . . ." *In re Kaine,* 55 U.S. (14 How.) at 1133.

The evidence of the circumstances of the conspiracy to cause explosions charged against petitioner unequivocally establishes that the offense was committed as an incident to and in the course of a political uprising. The magistrate found, and the evidence clearly shows, the existence of a political uprising in the United Kingdom by persons seeking to end British rule in Northern Ireland. The magistrate recognized the historic practice of such persons to use bombings as an expression of uprising. The magistrate cited the bombings by the Active Service Units as evidencing the existence of the political uprising.

The three letter bombs attributed to petitioner were not directed at the general civilian population, but to a Bishop of the British military and to two other representatives of the British establishment. These bombs, and the

three other bombs left at public places were part of a plan to bomb to bring the British to the bargaining table with the PIRA to negotiate on questions of British rule in Northern Ireland.

Combining the above evidence with the facts that the conspiracy charge against petitioner is a conspiracy with members of an Active Service Unit of the PIRA and that the six bombing incidents were attributed by British authorities to this Active Service Unit of the PIRA, there is no question in the evidence but that the conspiracy offense charged against petitioner was incidental to and in the course of the political uprising in the United Kingdom. It should be noted that bombing incidents by those opposed to British rule are the historical form of violent expression in the long controversy over such rule. The extradition treaty between the United States and the United Kingdom containing the political offense exception was most recently renegotiated in 1972. If the United States or the United Kingdom had wished acts such as those in the present case to be considered not subject to the political offense exception, they could have so provided in the Treaty by limiting the application of the exception.

The Court holds that petitioner cannot be extradited on the conspiracy to cause explosions offense because such extradition is barred by the political offense exception contained in the extradition treaty between the United States and the United Kingdom. In light of this conclusion, the Court does not decide, and expresses no opinion on the magistrate's conclusion that extradition on the offense was not barred by lapse of time.

VII. THE MURDER CHARGE AS AN OFFENSE OF A POLITICAL CHARACTER

A. Existence of a Political Uprising

The date Police Constable Tibble was killed was within the period of the alleged conspiracy to cause explosions charged against petitioner. Thus, the magistrate considered his determination that a violent political uprising existed at the time of the conspiracy offense to also apply to the time of the murder offense. Thus, a political uprising was found to exist at the time that Tibble was killed, and the Court here refers to its earlier comments regarding the existence of the political uprising at that time.

B. Incidental To and In Furtherance Of

As a political uprising existed at the time of the Tibble killing, petitioner cannot be extradited to stand trial in the United Kingdom on the murder charge if that offense was incidental to and in the course of a political uprising. As earlier discussed, this determination is made based upon the evidence of the circumstances attending the crime at the time of its commission, *Garcia-Guillern v. United States,* 450 F.2d at 519, with the motive of the accused being irrelevant. *Eain v. Wilkes,* 641 F.2d at 519.

The evidence in support of petitioner's position that the murder offense was of a political character again came from the evidence submitted by the United Kingdom in support of its request for petitioner's extradition, and from petitioner's three witnesses. In the evidence attached to the request for extradition it was shown that the individual who murdered Constable Tibble had emerged from a house on Fairholme Road before being stopped by Constable Blackledge. A subsequent search of a room on

Fairholme Road revealed a bomb factory of a PIRA Active Service Unit. Petitioner's fingerprints, and the fingerprints of petitioner's alleged co-conspirators, were found on items in the flat. The evidence also showed that when Blackledge told the individual who later shot Tibble that he would be searched, the individual told Blackledge that he would take Blackledge to the house on Fairholme Road, and then turned and ran. Additionally, the evidence established that the individual who shot Tibble had a gun on his person, and shot and killed Tibble, who was trying to block his path of escape.

Petitioner's witnesses testified that an Active Service Unit member would kill in the situation presented by the above facts in order to protect discovery of the bomb factory and the other members of the Active Service Unit. Dr. Bell testified as to the tense, isolated, constantly moving and near-paranoid lifestyle of an Active Service Unit member. There was also evidence that the PIRA believed that PIRA prisoners can be subject to torture and inhumane punishment upon arrest, and that the loss of a firearm is a capital offense within the PIRA.

The government's only evidence was the testimony of Peay that the State Department did not consider the murder of Tibble to be a crime of a political character. Though Peay offered this opinion, he refused to respond to cross-examination regarding the reasons for the opinion.

The Court finds that the magistrate's conclusion that the killing of Tibble was a criminal act removed from the political aims of the uprising group and therefore outside of the political offense exception is clearly erroneous. The great weight of the evidence regarding the circumstances

surrounding the shooting of Tibble show that the shooting was incidental to and in the course of the political uprising in the United Kingdom over British rule in Northern Ireland. The evidence showed that the killer's capture would lead, because of interrogation and possibly torture, to the discovery of the bomb factory, and that the killer shot the only man who had a chance of stopping his flight from the police.

The reasons the magistrate expressed for rejecting the political significance of the killing are without merit. First, the magistrate stated that the killer had no basis to conclude that Tibble was a police officer, and so was not threatened by him. This interpretation of the circumstances surrounding the killing is flawed because the killer was threatened by Tibble. Tibble was the only person standing in this man's path of escape from the police chasing him from behind. Tibble was in a crouched position ready to stop the fleeing killer. If Tibble had stopped him, the killer would surely have been arrested by the police whom he knew were close behind.

Second, the magistrate rejected the theory that the killer acted to protect the discovery of the bomb factory because the killer offered to take Blackledge to it. This too is a flawed interpretation of the facts. The evidence shows that the killer offered to take Blackledge to the house only after Blackledge told him that he would be searched, that the killer then turned as if to begin taking Blackledge to the house, and then ran. The more persuasive interpretation of these facts is that the killer offered to take Blackledge to the house as a dodge within which to attempt his escape.

Finally, the magistrate rejected the political nature of the killing with the statement that if the killing was to protect the bomb factory, the person to shoot was Blackledge, who had arguably identified the killer as a member of "the opposition forces," and not Tibble, who appeared to be a civilian. But as noted, the facts indicate that the killer shot the only person who could have stopped him from escaping. With capture leading to ultimate discovery of the bomb factory, the escape was crucial.

For the above reasons, the Court concludes that the killing of Constable Tibble was incidental to and in the course of the political uprising. Accordingly, petitioner's extradition on the charge of murder of Police Constable Tibble is barred by the political offense exception contained in the extradition treaty between the United States and the United Kingdom.

VIII. ORDER

Good cause appearing therefor, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is GRANTED. Petitioner is ordered relieved from the Certificate of Extraditability and Order of Commitment. Respondent is ordered to release petitioner from custody within ten (10) days of the date of this Order.

DATED: October 3, 1983.

/s/Robert P. Aguilar
United States District Court

FOOTNOTES

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[1] 18 U.S.C. section 3184 provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

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[2] Three of these bomb incidents were the subject of the six other charges against petitioner which the United Kingdom subsequently withdrew from the request for extradition.

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[3] The fingerprints of O'Doherty were not found on items in one of the flats.

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[4] Actually, the magistrate used the language "incidental to and in furtherance of" the political uprising. The propriety of using the phrase "in furtherance of" will be discussed at a later point in this Opinion.

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[5] In the English, but not the American, courts, where there is no political uprising the courts will look to the political mo-

tivation of the accused, and if the offense is politically motivated and directed toward political ends, extradition for trial on the charged offense will be refused. Regina v. Governor of Brixton Prison, ex parte Kolczynski [1954] 1 Q.B. 540, as explained in In re Gonzales, 217 F. Supp. 717, 721 n.9 (S.D.N.Y. 1963).

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[6] The Court reaches no conclusion as to whether this is the proper burden of proof in political offense exception cases.

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[7] Though it is generally not significant that a respondent does not challenge an adverse finding below in habeas corpus proceedings, in these proceedings respondent has sought review of a number of adverse decisions made by the magistrate, but which the Court has not needed to address in its resolution of this matter. Thus, the fact that respondent does not seek review of the finding of the existence of a political uprising *is* notable.

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[8] At this point the Court must point out that even if membership in an uprising group were a proper requirement to invoke the political offense exception, the Court would find that the magistrate's decision that petitioner was not a member of an uprising group was erroneous. All the evidence showed that petitioner was a member of an uprising group.

Most importantly, the evidence submitted by the United Kingdom in support of its request for extradition showed that petitioner was charged with conspiring with members of the Balcombe Street Four, who were acknowledged to be members of an Active Service Unit of the PIRA. The United Kingdom's evidence also showed that the bombings [sic] the subject of the conspiracy charge were attributed to the Balcombe Street Four and to this Active Service Unit. Additionally, there is evidence that petitioner shared residences with members of the Balcombe Street Four, and that petitioner took part in various bombing incidents with them. Even petitioner's conviction for being a member of the IRA is probative evidence that he was a member of an uprising group at the time of the alleged bombing conspiracy. During his imprisonment petitioner was a special category prisoner, and thus treated as a political prisoner or prisoner of war.

There is no evidence to contradict the above summarized evidentiary showing. The basis for the magistrate's rejection of this evidence rests upon pure speculation, and points out vividly the reason that membership should not be a required element of the political offense exception. For example, the magistrate states that the conviction for membership in the IRA is not persuasive evidence of membership in the PIRA, but that even if it was, membership in a dispersed, covert organization such as the PIRA, which has little control over the lower reaches of its hierarchy, does not prove that petitioner was a member of the Active Service Unit. It is thus unclear what uprising group the magistrate feels that petitioner should prove his membership in. And the magistrate appears to make it more difficult for an accused to prove membership in a loosely organized uprising group. As discussed by the Court earlier, these considerations should not prevent, in themselves, application of the political offense exception.

As a further example, the magistrate rejected petitioner's evidence of membership in an uprising group stating that petitioner could well have been a "mere-hanger on or common criminal." Petitioner presented about as much evidence as he could, short of testifying, for the purpose of negating every speculative reason that he could not be considered a member of an uprising group. By relying upon speculation to contradict petitioner's evidence, the magistrate in essense required that petitioner testify. Such a result is improper. *See* Eain v. Wilkes, 641 F.2d at 504.

Petitioner made a convincing showing that he was a member of an uprising group, and there was no evidence presented to the contrary. The magistrate had no choice on the evidence but to find that petitioner was a member of an uprising group, and his conclusion to the opposite was erroneous.

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[9] Note should also be made of the two recent magistrate's decisions finding the political offense exception to bar extradition of persons active with the PIRA. In *Mackin*, the magistrate found a PIRA member on a reconnaisance mission who attacked a British soldier to have committed offenses incidental to and in the course of a political uprising. In *McMullen*, the magistrate found a PIRA member who bombed a military barracks to have committed an offense incidental to and in the course of a political uprising.

[10] The magistrate also indicated that actions by Active Service Units were at times contrary to PIRA policy. There is no question in the evidence that the Active Service Unit to which the bombing incidents the subject of this case were attributed was under the direction of the PIRA. Any conclusion that the Unit acted contrary to PIRA directives is not supported by the evidence, and consists entirely of speculation. At all times this Unit acted as a PIRA Active Service Unit.

[11] There is some suggestion in Eain v. Wilkes that the political offense exception will be more easily found to apply where organized battles exist. *Id.* at 519. However, as long as there is a finding that a violent political uprising exists, the degree of organization of the uprising groups or their battles should have no effect on the applicability of the political offense exception.

[12] In *Castioni,* Judge Denman did distinguish between "in the course of" and "in furtherance of," but only in the context of rejecting the position of John Stuart Mill that for the political offense exception to apply an offense need take place only "in the course of" a political uprising, Judge Denman finding that the act must have some reference to the object of the political uprising. The "incidental to" portion of the American requirement takes care of Judge Denman's concern. As evidenced from his opinion, Judge Denman did not intend "in furtherance of" to take on the meaning added by the magistrate that the effectiveness of the act, and the formal approval of the act by the hierarchy within the uprising group, are considerations in determining the applicability of the political offense exception.

[13] The magistrate said there was no evidence of a direct link between the bombings and the PIRA's political goals to force British withdrawal from Northern Ireland because the actions did not take place in Northern Ireland and were not directed against the government the PIRA was attempting to displace. That the bombings were not in Northern Ireland is irrelevant because it is the British government that the PIRA protested and sought to negotiate with. As noted by the magistrate in his determination that a political uprising existed, the offenses committed were against the same sovereign and so the location of the offense is not relevant. As to the entity at which the bombings were directed, the evidence shows that the bombings were directed at the purpose of bringing the British to the bargaining table. As the *Eain* court noted, violence can effect innocent civilians where this direct link is present. *Id.* at 521.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 83-2455
D.C. NO. CV 82-6688-RPA

WILLIAM JOSEPH QUINN,

Petitioner-Appellee,

vs.

GLEN ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent-Appellant.

OPINION

(Filed February 18, 1986)

Appeal from the United States District Court
for the Northern District of California

Honorable Robert P. Aguilar, District Judge, Presiding
Argued and Submitted July 11, 1984—San Francisco

Before: DUNIWAY, FLETCHER, and REINHARDT, Circuit Judges

REINHARDT, Circuit Judge:

Pursuant to 18 U.S.C. § 3184 (1982) and the governing treaty between the United States and the United Kingdom of Great Britain and Northern Ireland ("United Kingdom"), Extradition Treaty of June 8, 1972, United States—United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter cited as *Treaty*], the United Kingdom seeks the extradition of William Joseph Quinn, a member of the Irish Republican Army ("IRA"), in order to try him for the commission of a murder in 1975 and for conspiring to cause explosions in London in 1974 and 1975. After a United

States magistrate found Quinn extraditable, Quinn filed a petition for a writ of habeas corpus. The district court determined that Quinn cannot be extradited because a long-standing principle of international law which has been incorporated in the extradition treaty at issue—the political offense exception—bars extradition for the charged offenses. The United States government, on behalf of the United Kingdom, appeals.

This case requires us to examine the parameters of a foreign sovereign's right to bring about the extradition of an accused who maintains that the offenses with which he is charged are of a political character. Ultimately we must determine whether the political offense exception is applicable to the type of violent offenses Quinn is alleged to have committed. We undertake this task with the aid of very little helpful precedent. The United States Supreme Court has discussed the political offense exception only once, and then during the nineteenth century. *See Ornelas v. Ruiz,* 161 U.S. 502 (1896). The only time we considered the subject, *see Karadzole v. Artukovic,* 247 F.2d 198 (9th Cir. 1957), the Supreme Court vacated our opinion, *see Karadzole v. Artukovic,* 355 U.S. 393 (1958) (mem.), an opinion which, in any event, has subsequently been roundly and uniformly criticized, *see Eain v. Wilkes,* 641 F.2d 504, 522 (7th Cir.), *cert. denied,* 454 U.S. 894 (1981); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law,* 48 Va. L. Rev. 1226, 1246 (1962); Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists,* 71 *J. Crim. L & Criminology* 193, 205 (1980). Only one circuit has previously considered in any detail how or whether the exception applies when the accused person or

persons have engaged in conduct involving the use of some of the more violent techniques or tactics that have come to mark the activities of contemporary insurgent or revolutionary movements. *Eain v. Wilkes,* 641 F.2d 504 (7th Cir.), *cert. denied,* 454 U.S. 894 (1981). The few opinions of other circuits that have considered the exception shed no light on the difficult questions we must resolve here.[1] Therefore, we must carefully examine the historic origins of the political offense exception, analyze the various underpinnings of the doctrine, trace its development in the lower courts and elsewhere, and seek to apply whatever principles emerge to the realities of today's political struggles.

In the case before us, we find, for reasons we will explain in full, that the charged offenses are not protected by the political offense exception. We vacate the writ of habeas corpus and remand to the district court. We hold that Quinn may be extradited on the murder charge but that the district court must consider Quinn's remaining defense to the conspiracy charge before extradition is permitted for that offense.*

I. BACKGROUND

A. The Extradition Treaty

The right of a foreign sovereign to demand and obtain extradition of an accused criminal is created by treaty. *Ramis v. Diaz,* 179 F. Supp. 459, 460-61 (S.D. Fla. 1959). In the absence of a treaty there is no duty to extradite, *see Factor v. Laubenheimer,* 290 U.S. 276, 287 (1933); Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence,*

20 Harv. Int' L.J. 61, 74 (1979); *cf.* Bassiouni, *International Extradition: A Summary of Contemporary American Practice and a Proposed Formula,* 15 Wayne L. Rev. 733, 734 (1969) (in Western world, "extradition is a matter of favor or comity rather than a legal duty"), and no branch of the United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty. *Factor v. Laubenheimer,* 290 U.S. 276, 287 (1933); *Ramos,* 179 F.2d at 460-61.

The extradition treaty between the United States and the United Kingdom provides for the reciprocal extradition of persons found within the territory of one of the nations who have been accused or convicted of certain criminal offenses committed within the jurisdiction of the other nation. *Treaty, supra* p. 1, at art. I. Murder and conspiracy to cause explosions, the offenses with which Quinn has been charged, are extraditable offenses under the Treaty. *Id.* art. III(1), (2).

United States citizenship does not bar extradition by the United States. *See Charlton v. Kelly,* 229 U.S. 447, 467 (1913); *Escobedo v. United States,* 623 F.2d 1098, 1104-07 (5th Cir.), *cert. denied,* 449 U.S. 1036 (1980). However, under the doctrine of "dual criminality," an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations. *Factor,* 290 U.S. at 293; *Caplan v. Vokes,* 649 F.2d 1336, 1343 (9th Cir. 1981); *see, e.g., Treaty, supra* p. 1, at art. III(1)(a). In addition, there must be evidence that would justify committing the accused for trial under the

law of the nation from whom extradition is requested if the offense had been committed within the territory of that nation. *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); 18 U.S.C. § 3184 (1982); *see, e.g., Treaty, supra* p. 1, at art. VII(d). United States courts have interpreted this provision in similar treaties as requiring a showing by the requesting party that there is probable cause to believe that the accused has committed the charged offense. *See, e.g., Glucksman v. Henkel*, 221 U.S. 508, 512 (1911); *United States ex rel. Sakaguchi v. Kaululukui*, 520 F.2d 726, 729-31 (9th Cir. 1975). The doctrine of "specialty" prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite. *United States v. Rauscher*, 119 U.S. 407, 420-21 (1886); *Caplan v. Vokes*, 649 F.2d at 1343; *see, e.g., Treaty, supra* p. 1, at art. XII.

The treaty between the United States and the United Kingdom provides certain exceptions to extradition, notwithstanding the existence of probable cause to believe that the accused has committed the charged offense. In particular, the treaty specifies that "[e]xtradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requested party as one of a political character . . . ." *Treaty, supra* p. 1, at art. V(1)(c).

B. Factual Background

Quinn, a United States citizen, was arrested on September 30, 1981 in Daly City, California pursuant to a provisional arrest warrant issued by a United States magistrate upon application of the United States acting for and

on behalf of the United Kingdom. On November 4, 1981, the United Kingdom formally requested Quinn's extradition to face charges of the murder of Police Constable Stephen Tibble and conspiracy to cause explosions of a nature likely to endanger human life.[2]

The duration of the conspiracy with which Quinn is charged is from January 1, 1974 to April 3, 1975, the day before Quinn was arrested for questioning regarding separate 1974 offenses of kidnapping and assault. Quinn was, in fact, charged, tried, and convicted at that time in Ireland, in a special court utilized for the trial of political cases, of membership in an outlawed organization—the IRA. He was imprisoned in Dublin as a "special category prisoner"—a political prisoner incarcerated in a manner akin to prisoner-of-war status—until January 2, 1976.

The evidence before the United States magistrate regarding the conspiracy centered around six specific bombing incidents:

1. On January 18, 1974, a hollowed-out copy of the Bible containing a bomb was mailed to and received by Bishop Gerard William Tickle in London. At that time, Bishop Tickle was the Roman Catholic Bishop to the British Armed Forces. Quinn's fingerprints were found on the wrapping paper around the bomb, which was defused without causing any harm.

2. On January 30, 1974, a letter bomb was sent to the Surrey, England home of Crown Court Judge John Huxley Buzzard who, at that time, was a senior Treasury Prosecuting Counsel. When Judge Buzzard began to open

the package, it partially exploded, lacerating his face, hands, and wrist and causing the loss of the ends of two fingers on his left hand. Quinn's fingerprints were on the wrapping around the bomb.

3. On February 4, 1974, a letter bomb was sent to the offices of Max Aitken, Chairman of the Daily Express newspaper in London. Aitken's assistant secretary, who partially opened the package, believed it looked suspicious and called a security guard. As the security guard picked up the package, it partially exploded and the officer lost most of the fingers on his left hand. Quinn's fingerprints were found on the book in which the bomb was concealed.

4. On December 20, 1974, a bomb was found in the foyer adjacent to the loading platform at Aldershot Railway Station in Hampshire County, England. The bomb was defused without causing any harm, and the fingerprints of a number of Quinn's alleged co-conspirators were found on the wrapping paper and bomb mechanisms.

5. On December 21, 1974, a bomb was discovered in an attache case in the archway entrance to the Kings Arms Public House in Warminster, England. The bomb was defused and the fingerprints of Gilhooley, a fugitive who was not indicted as a co-conspirator, were found on its timing mechanism.

6. On January 27, 1975, a bomb was found in a black bag on the front step of the Charco-Burger Grill on Heath Street in London. The bomb was defused and Quinn's fingerprints were found on the Irish newspaper that had been used to wrap the bomb.

Searches of two flats in the London area conducted during this time period revealed explosives, detonators,

fuses, and diagrams of bomb construction. Fingerprints matching those of Quinn, his alleged co-conspirators, and Gilhooley were each found on at least one item at each location.

The murder with which Quinn is charged took place on February 26, 1975. On that day, Police Constables Adrian Blackledge and Leslie White were patrolling the West Kensington area of London on foot, looking for burglary suspects. Blackledge saw a man engaged in "suspicious" behavior, such as looking around and changing directions. Blackledge lost sight of the man but later, while White was on a lunch break, saw the suspect reappear from one of a number of houses on Fairholme Road. Blackledge approached the man while he waited at a bus stop, identified himself as a police officer, and asked the man where he had been. The suspect was unable to give Blackledge the address of the house he had emerged from and gave his name as William Rogers. The suspect said he would take Blackledge to the home he had visited, began to walk away, then ran.

A chase ensued, and other plainclothes police officers, including Temporary Detective Constable Derek Hugh Wilson joined in. Police Constable Stephen Tibble, who was on a motorcycle dressed in civilian clothes, caught up to the suspect, got off his motorcycle, and assumed a crouched position. The suspect shot Tibble three times and ran, evading the other officers. Tibble died that afternoon.

Blackledge described the suspect as 25-30 years old, with straight, short, light brown hair of about collar length, a heavy build, a slightly tanned complexion, and a "mellow" Irish accent. Wilson estimated the suspect's height at five feet ten inches. He offered a description of the sus-

pect that differed in only two respects from Blackledge's. Wilson described the suspect as slimly built, and said he had dark brown hair. Quinn speaks with an American accent but has been reputed to have assumed an Irish accent on occasion. He normally has a pale complexion. He has a slim build and dark brown hair.

On December 12, 1975, British police arrested Quinn's alleged co-conspirators after a six-day siege with hostages in a flat in London. In the flat they discovered, among other things, a revolver. Bullets fired from this revolver revealed rifling characteristics similar to those on the bullets recovered from Tibble's body.

Quinn's alleged co-conspirators became known as the "Balcombe Street Four" during their trial under the British Prevention of Terrorism Act on charges stemming from their activity as members of an Active Service Unit ("ASU") of the Provisional Irish Republican Army ("PIRA"), a more violent offshoot of the IRA. ASUs are small groups of PIRA members who conducted a series of violent actions in England, including bombings designed to pressure the British government into negotiating independence for Northern Ireland. Quinn's alleged co-conspirators were tried in a special criminal court in London utilized only for prosecution of "political cases," and the prosecution at their trial argued that the motive in setting the bombs was purely political.

On May 14, 1975, Constable Blackledge was taken to the Special Criminal Court in Dublin, where Quinn was appearing on the charge of being a member of the IRA. Blackledge pointed Quinn out to Rollo Watts of the Special Branch of New Scotland Yard and identified Quinn as the

man who had shot Tibble. On October 8, 1981, Watts was shown a photograph of Quinn taken in San Francisco on September 30, 1981, at the time of Quinn's arrest by the FBI. Watts identified Quinn as the man that Blackledge had identified in Ireland six years earlier.

C. Decisions Under Review

After the United Kingdom formally requested Quinn's extradition, a United States Magistrate conducted preliminary proceedings and a hearing to determine extraditability pursuant to 18 U.S.C. § 3184 (1982). Quinn contended that the conspiracy charge was time barred, that the evidence was insufficient to establish probable cause to believe he had committed the alleged crimes, and that all the offenses for which the United Kingdom seeks his extradition are "offenses of a political character" upon which extradition cannot be based. At the hearing, Quinn introduced evidence regarding activities of the IRA and the PIRA in Northern Ireland and in England that were designed to cause the overthrow of British rule in Northern Ireland. Quinn did not testify at the hearing or otherwise offer any evidence of his own motivation for his alleged participation in the charged crimes.

On September 29, 1982, the magistrate rejected Quinn's defenses and issued a Certification of Extraditability and Order of Committment to the Secretary of State. The magistrate held that in order to qualify for the protection afforded by the political offense exception, Quinn had to show three elements: that there was a violent political uprising, that he was a member of the uprising group, and that the crimes were committed in furtherance of the uprising. The magistrate concluded that there was a violent po-

litical uprising in the United Kingdom at the time of the alleged crimes sufficient to bring into play the political offense exception. However, he found that Quinn had not proved the other two elements of a political offense.

According to the magistrate, Quinn's evidence of his membership in the IRA was of little weight since he had failed to demonstrate that he was a member of the PIRA or of the Active Service Unit that allegedly conducted the bombings. The magistrate also determined that Quinn failed to show that the charged crimes were "in furtherance of" PIRA political goals. According to the magistrate, because the ASUs often acted without guidance from superiors, their targets may have been chosen for personal reasons—such as spite or revenge—rather than out of political motivations. Second, the magistrate determined that the bombings could not be "in furtherance" of the uprising because there was no evidence that any hierarchy within the PIRA had considered their potential effectiveness in promoting the group's political goals. Third, relying in part on *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), the magistrate found that the bombings failed to meet the "direct link" test because they were directed at civilians rather than the government the IRA was attempting to displace and they did not take place in Northern Ireland. Quinn contended that the murder of Officer Tibble was a political offense because it was motivated by the killer's fear that, if captured, he would be questioned and forced to reveal information about PIRA activities. The magistrate rejected this argument as well, finding that the murder was motivated by a simple desire to escape capture.

Quinn filed a Petition for Writ of Habeas Corpus commanding Glen E. Robinson, the United States Marshal, to release him.[3] The district court did not address all of Quinn's arguments[4] because it determined that the offenses for which extradition is being sought are non-extraditable political offenses.[5]

In granting Quinn's petition, the district court identified three legal errors in the magistrate's analysis and found that the magistrate erred in its factual findings regarding Quinn's membership in the PIRA and the killer's motive for the Tibble murder. First, the district court held that the magistrate was wrong in requiring Quinn to show, as a separate element, membership in an uprising group. Second, the district court concluded that the magistrate erred in imposing a requirement that the acts potentially be politically efficacious or directed by a hierarchy within the PIRA in order to meet the requirement of being "incidental to" the uprising. Third, the court disagreed with the magistrate's application of *Eain* to this case, noting that the motive of the petitioner in *Eain*, a member of the Palestinian Liberation Organization ("PLO"), in bombing civilians was to drive them out of Israel. Here, in contrast, the court found that the motive was to influence the British government in its relationship with the PIRA and Northern Ireland and that the potential harm to civilians was merely a consequence of the activities designed to influence the government. As to the Tibble murder, the district court determined that the magistrate erred in finding no political motive. Although it agreed that the killing was the result of an effort to avoid immediate capture, the court said that it was incidental to the uprising because Quinn was trying to avoid a capture that could lead to the discovery of the bomb factory.

II. JURISDICTION TO CONSIDER THE POLITICAL EXCEPTION

As it has in other recent extradition cases, *see, e.g., In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), the government contends that both the magistrate and the district court lacked jurisdiction to determine whether the political offense exception bars extradition. According to the government, the language of both the jurisdictional statute and the treaty precludes a judicial determination of whether the exception applies. Moveover, the government contends, such a determination involves political questions that only the executive branch of the government can resolve. Like every court before us that has considered these arguments, *see, e.g., Mackin*, 668 F.2d at 135-37; *Eain*, 641 F.2d at 512-18; *In re Ezeta*, 62 F. 972, 996-97 (N.D. Cal. 1894), and like those that have not explicitly considered them but have proceeded to determine whether the exception applies, *see, e.g., Ornelas v. Ruiz*, 161 U.S. 502, 510-12 (1896); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), we believe the government's contentions to be meritless.

A. The Language of the Statute and the Treaty

The government contends that the jurisdictional statute, 18 U.S.C. § 3184, fails to authorize the magistrate to determine whether the political offense exception applies and that the treaty explicitly contemplates an executive branch resolution of the question. According to the government, section 3184's command that the magistrate consider whether "the evidence [is] sufficient to sustain the charge under the provisions of the proper treaty" authorizes the magistrate to determine only whether there is probable cause to believe the accused committed the offense.

The government further notes that the treaty calls for the "requested party" to determine if it regards the offense as one of a political character. *See Treaty, supra* p. 1, at art. V(1)(c)(ii). According to the government, the term "requested party" refers to the Secretary of State, not the judiciary.

The government's construction of both the statute and the treaty is in error. The "requested party" language has been used in treaties since at least the turn of the century, *see Mackin,* 668 F.2d at 132-33 (citing treaties), and has consistently been interpreted to refer to the country, not any particular branch of its government. The language does not undermine the well-established responsibility of the extradition magistrate—and the judiciary on habeas review—to determine whether the charged offenses is or is not extraditable. *Id.; Caplan v. Vokes,* 649 F.2d 1336, 1342-44 (9th Cir. 1981); *Eain,* 641 F.2d at 517-18. The determination whether a crime is extraditable "under the provisions of the treaty" includes consideration of whether the crime is non-extraditable because it falls within the political offense exception. *See Ezeta,* 62 F. 996-97. We fail to see how the magistrate could determine whether there is probable cause that the defendant committed an extraditable crime without determining whether the charged offense is one for which extradition is prohibited. Nor can we conclude in the absence of explicit language that Congress, in enacting 18 U.S.C. § 3184, intended to restrict the ability of the judiciary to carry out its role in protecting the liberty interests of individuals by requiring us to review extradition orders without considering all aspects of the pertinent question—whether there is probable cause to believe that the accused committed an extraditable offense.

B. The Political Question Doctrine

The government next argues that because three of the factors enumerated in *Baker v. Carr,* 369 U.S. 186, 217 (1962), are present in this case, the judiciary should abstain, under the political question doctrine, from determining whether the political offense exception applies. The government contends that determining whether the exception applies requires a policy determination of a kind clearly inappropriate for the exercise of judicial discretion, that different pronouncements from the executive and judiciary on matters necessary to a determination of the applicability of the exception could embarrass the government, and that the issue does not lend itself to resolution through judicially discoverable manageable standards. Other circuit courts have considered and rejected the precise arguments advanced by the government in this case. *See Mackin,* 668 F.2d at 132-37; *Eain* 641 F.2d at 513-18; *cf. Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 796-98 (D.C. Cir. 1984) (Edwards, J., concurring) (political question doctrine is a very limited basis for nonjusticiability and does not bar review of a tort claim for damages consequent to terrorist activities), *cert. denied,* 105 S. Ct. 1354 (1985). *But see id.* at 826 (Robb, J., concurring) ("[T]here is simply 'no justiciable standard to the political offense.' ") (quoting *Extradition Reform Act of 1981. Hearings on H.R. 5227 Before the Subcommittee on Crime of the House Committee on the Judiciary,* 97th Cong., 2d Sess. 24-25 (testimony of Roger Olson, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice)). Like these courts, we recognize the executive branch's interest in matters that touch on foreign policy. However, as did Judge Friendly in *Mackin,* 668 F.2d at 134, we also recognize the individual liberty concerns at stake in cases of this nature and note the Supreme Court's long accepted conclu-

sion that "extradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty, and ought never to be allowed in this country." *In re Kaine*, 55 U.S. (14 How.) 103, 112 (1852).

In identifying the specific *Baker v. Carr* factors that it claims are present in this case, the government begins by noting that in order to consider whether the political offense exception applies, a court must determine whether a political uprising was in progress in the foreign land when the offense occurred. *See infra* p. 41. The government contends that such a factual finding requires a policy determination. We disagree. We need not determine whether the uprising was "justified" or was motivated by political forces of which we approve.[6] Rather, we must determine simply whether an uprising was in progress. "The existence of a violent political uprising is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not." *Eain*, 641 F.2d at 514. Furthermore, like the Seventh Circuit, we believe that even if unique, sensitive information that is available to the State Department bears on this factual issue, there are adequate mechanisms—such as *in camera* disclosure—for ensuring that the material can be produced for judicial consideration. *See id.* at 514-15.

The government also contends that the presence of a second factor enumerated in *Baker v. Carr* counsels judicial abstention. The government argues that a judicial determination that Quinn's extradition is precluded by the political offense exception would "recognize" political terrorists and would thus constitute a potentially embarrassing pronouncement different than the pronouncements of the executive branch. Like the Seventh Circuit, *see*

Eain, 641 F.2d at 515, we do not believe the executive branch has refused to recognize the existence of terrorists. Rather, in some cases, it may have refused to recognize the *legitimacy* of these groups. We fail to see why a judicial acknowledgement that terrorist groups exist would constitute a "recognition" of those groups in the sence of legitimizing their actions. *Cf. Tel-Oren,* 726 F.2d at 822 (Bork, J., concurring) (noting that judicial acknowledgment of effect of PLO on the foreign relations of the United States does not grant the PLO any form of "official recognition" and is similar to the executive branch's commenting on the subject of the PLO while continuing to maintain that the group is not deserving of recognition).

Far from embarrassing the executive branch, assigning to the judiciary the responsibility for determining when the exception applies actually affords a degree of protection to the executive branch. As a political branch, the executive could face undue pressure when public and international opposition to the activities of an unpopular group create conflicts with the treaty obligation created by the political offense exception. *See* Epps, *supra* p. 4, at 84 ("[T]he requesting state is much more likely to be irate if a court deems the fugitive extraditable but the executive reverses that decision."); *cf. Eain,* 641 F.2d at 513 (assignment of this determination to judiciary allows executive branch to avoid risk of political and economic sanctions that could result from discretionary executive refusal to extradite) (quoting Lubet & Czackes, *supra* p. 3, at 200; citing I.A. Shearer, *Extradition in International Law* 192 (1971); Note, *Bringing the Terrorist to Justice: A Domestic Law Approach,* 11 Cornell Int'l L.J. 71, 74 (1978)). By assigning the initial determination of when

the exception applies to the impartial judiciary—particularly life-tenured Article III judges—Congress has substantially lessened the risk that majoritarian consensus or favor due or not due to the country seeking extradition will interfere with individual liberty. *See* C. Van den Wijngaert, *The Political Offense Exception ot Extradition* 100 (1980) ("[A]dministrative decisions with respect to extradition are much more likely to be influenced by political elements than the decisions of the courts."). The treaty's assignment to the judiciary of the task of determining the applicability of the political offense exception "reflects a congressional judgment that that decision not be made on the basis of what may be the current view of any one political administration." *In re Doherty*, 599 F. Supp. 270, 277 n.6 (S.D.N.Y. 1984).[7]

Nor does the assignment to the judiciary of the initial determination of the applicability of the political offense exception deprive the executive branch of all discretion to determine that a person claiming the protection of that exception should not be extradited. The executive branch has the ultimate authority to decide whether to extradite the accused after a judicial determination that the individual is, in fact, extraditable. *Eain*, 641 F.2d at 516 (citing *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894)); 18 U.S.C. § 3186 (1982). Although the Secretary of State's authority to refuse extradition is presumably constrained by our treaty obligations, the contours of executive branch discretion in this area have never been expressly delineated. Bassiouni, *supra* p. 4, at 756 (["T]he statute should probably be interpreted to grant the Secretary only limited discretion to differ from the courts in the matter of treaty

interpretation. In fact, the Secretary has always based his refusal to surrender upon a determination that the treaty did not require extradition in that instance. . . .

[T]he Secretary apparently considers his discretion only coextensive with the issues presentable at the extradition proceedings . . . [and] has refused surrender infrequently (only twice between 1940 and 1960) . . . .''). Nevertheless, it is clear that the Secretary of State has sole discretion to determine whether a request for extradition should be denied because it is a subterfuge made for the purpose of punishing the accused for a political crime, *see In re Lincoln,* 228 F. 70 (E.D.N.Y. 1915), *aff'd,* 241 U.S. 651 (1916) (per curiam), or to refuse extradition on humanitarian grounds because of the procedures or treatment that await a surrendered fugitive, *Arnbjornsdottir-Mendler v. United States,* 721 F.2d 679, 683 (9th Cir. 1983); *Escobedo v. United States,* 623 F.2d 1098, 1105 (5th Cir.), *cert. denied,* 449 U.S. 1036 (1980); 18 U.S.C. § 3186 (1982).

Finally, the government points out the difficulty of defining which offenses are of a political character. It suggests that this difficulty demonstrates an absence of judicially discoverable manageable standards, another factor that, according to *Baker v. Carr,* counsels for judicial abstention. As in many areas of the law, and as we discuss further in the remainder of this opinion, there has always been debate about the precise contours of the political offense exception. But the absence of perfect predictive ability in discerning whether a given act falls within the exception is not synonymous with an absence of manageable standards. Rather, as with other complex legal problems, the basic standards that guide us in decid-

ing whether the exception applies are refined on a case-by-case basis as new situations arise. The determination whether there was a violent political disturbance in the requesting country at the time of the alleged acts and whether the acts were incidental to the disturbance, *see infra* pp. 62-72, are mixed questions of law and fact, *see Ornelas v. Ruiz,* 161 U.S. 502, 509 (1896), that do not require a political judgment. *See Eain,* 641 F.2d at 516. We fail to see how the judicial construction of 18 U.S.C. § 3184 and the applicable treaty, and the application of these laws to the facts of a given case, differs from all other judicial decisionmaking.

As the Supreme Court noted in *Baker v. Carr,* "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211.[8] The magistrate properly considered the applicability of the political offense exception to the offenses charged against Quinn, and we as well have a responsibility to construe the treaty and to determine whether "it provides the answer." *Id.* at 212.

III. STANDARD OF REVIEW

A. District Court Review of The Magistrate's Order

The scope of the district court's review of a magistrate's extradition order on a petition for writ of habeas corpus is limited to "whether the magistrate had jurisdiction, whether the offense [sic] charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips,* 268 U.S. 311, 312 (1925); *accord Zana-*

zanian v. United States, 729 F.2d 624, 626 (9th Cir. 1984). Preliminarily, the magistrate must determine, and the court must review whether the extradition treaty was in effect and applicable to the case and whether the person named in the complaint is the individual before the magistrate. *See Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert denied*, 348 U.S. 818 (1954). As discussed *supra* Section II, the political offense question is reviewable on habeas corpus as part of the question of whether the offense charged is within the treaty. *See Eain*, 641 F.2d at 13-18.

The question whether the offense comes within the treaty ordinarily involves a determination of whether it is listed as an extraditable crime and whether the conduct is illegal in both countries, *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *see supra* p. 5; these are purely legal questions that the habeas court may review *de novo*. *Kamrin v. United States*, 725 F.2d 1225 (9th Cir. 1984); *Cucuzzella v. Keliikoa*, 638 F.2d 105 (9th Cir. 1981). Purely factual questions in extradition cases are reviewed under the clearly erroneous standard. *See, e.g., Caplan v. Vokes*, 649 F.2d 1336, 1342 (9th Cir. 1981) (finding that accused was a fugitive reviewed under clearly erroneous standard). The magistrate's probable cause determination "serve[s] only the narrow function of indicating those items of submitted evidence on which the decision to certify extradition is based." *Caplan v. Vokes*, 649 F.2d at 1342 n.10. Because the magistrate's probable cause finding is thus not a finding of fact "in the sense that the court has weighed the evidence and resolved disputed factual issues," *id.*, it must be upheld if there is any competent evidence in the

record to support it. *See Fernandez,* 268 U.S. at 312; *Zanazanian,* 729 F.2d at 626; *Valencia v. Limbs,* 655 F.2d 195, 197 (9th Cir. 1981).

The political offense issue, in contrast to the determinations discussed above, is a mixed question of law and fact. *See Ornelas v. Ruiz,* 161 U.S. at 509. Accordingly, the district court must review the magistrate's determination on this issue in the same manner that an appellate court reviews a district court's findings on mixed fact and law questions. Review of the application of law to fact depends on whether the determination is "essentially factual"—in which case it is reviewed under the clearly erroneous standard, *United States v. McConney,* 728 F.2d 1195, 1203 (9th Cir.) (en banc), *cert. denied,* 105 S. Ct. 101 (1984)—or whether it requires the court to consider "legal concepts in the mix of fact and law and to exercise judgment about values that animate legal principles"—in which case the issue is reviewed *de novo, id.* at 1199-1204. Accordingly, a district court must review the magistrate's purely factual findings underlying the application of the political offense exception under the clearly erroneous standard, while the mixed determinations at issue—such as the question whether the crime was incidental to a political uprising—must be reviewed *de novo.*[9]

B. Appellate Review of the District Court's Decision

As discussed *supra* Section I.B., the district court disagreed with some of the magistrate's factual findings and legal determinations, as well as its ultimate conclusion on the mixed questions of whether the charged crimes were political offenses. There is no question that we review the

legal questions and mixed questions *de novo*. *McConney*, 728 F.2d at 1199-1204. Quinn contends, however, that we should uphold the *district court's* factual findings unless they are clearly erroneous, while the government urges us to defer to the factual findings made by the *magistrate* unless they are clearly erroneous. In support of his argument, Quinn contends that *Hooker v. Klein*, 573 F.2d 1360 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978), requires us to focus on "the findings of fact and conclusions of law made by the district court in granting or denying habeas relief." *See id.* at 1368. In that case, however, the habeas court affirmed the extradition court[10] without making specific findings. We focused on the findings of the court that had ordered extradition, which were adopted by the district court that heard the petition for writ of habeas corpus. *See also Caplan v. Vokes*, 649 F.2d 1336 (9th Cir. 1981) (clearly erroneous standard applied to factual findings of district court that had both ordered extradition and denied petition for habeas corpus).

It would make little sense for us to ignore the factual findings of the judicial tribunal that made the initial factual determinations and defer, instead, to the differing factual findings made by a similar tribunal that merely reviewed the record of the earlier proceedings and held no evidentiary hearing of its own. Rather, we must determine whether the habeas court erred, as a matter of law, in overruling the magistrate's factual findings. Accordingly, we will defer to the extradition tribunal's factual findings unless we agree with the district court that they are clearly erroneous.

IV. THE DEVELOPMENT OF THE POLITICAL OFFENSE EXCEPTION

A. Origin of the Exception

The first-known extradition treaty was negotiated between an Egyptian Pharaoh and a Hittite King in the Thirteenth Century B.C. *See* I.A. Shearer, *supra* p. 22, at 5. However, the concept of political offenses as an exception to extradition is a rather recent development. In the centuries after the first known extradition treaty, and throughout the Middle Ages, extradition treaties were used primarily to return political offenders, rather than the perpetrators of common crimes, to the nations seeking to try them for criminal acts. *See* I.A. Shearer, *supra* p. 22, at 166; Recent Decisions, *The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 Notre Dame L. Rev. 1005, 1008 (1984) [hereinafter cited as *20th Century American Courts*]. It was not until the early nineteenth century that the political offense exception, now almost universally accepted in extradition law, was incorporated into treaties.

The French and American revolutions had a significant impact on the development of the concept of justified political resistance, *see* Declaration des droits de l'homme et du Citoyen du 26 aout 1789, art. 2 (Fr.), *incorporated as* La preamble de la Constitution de 1791 (Fr.), *reprinted in Les Constitutions de la France Depuis 1789*, at 33, 33 (S. Godechot ed. 1970) (declaring as an inalienable right "la resistance a l'oppression"); La Constitution de 1793, art. 120 (Fr.), *reprinted in Les Constitutions de la France Depuis 1789, supra*, at 79, 91 (France "donne asile aux etrangers bannis de leur patrie pour le cause de la lib-

erte."); The Declaration of Independence para. 1 (U.S. 1776) (("[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . . "); as did the political philosophers of the time, *see* J. Locke, *The Second Treaties of Civil Government*, ch. XIX (T. Cook ed. 1947); J.S. Mill, *On Liberty and Considerations on Representative Government* (R. McCallum ed. 1948). In 1834, France introduced the political offense exception into its treaties, *see* I.A. Shearer, *supra* p. 22, at 166-67, and by the 1850's it had become a general principle of international law incorporated in the extradition treaties of Belgium, England, and the United States as well. *See* C. Van den Wijngaert, *supra* p. 22, at 5-14;Epps, *supra* p. 4, at 62-63.

The political offense exception is premised on a number of justifications. First, its historical development suggests that it is grounded in a belief that individuals have a "right to resort to political activism to foster political change." Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U. J. Int'l L. & Pol. 617, 622 (1981) [hereinafter cited as *Politics of Extradition*]; *see also In re Doherty*, 599 F. Supp. 270, 275 n.4 (S.D.N.Y. 1984) ("The concept was first enunciated during an era when there was much concern for and sympathy in England for the cause of liberation for subjugated peoples.") (citation omitted). This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. *Politics of Extradition*, *supra* p. 31, at 623. Second, the exception reflects a concern that individuals—particularly unsuccessful rebels—should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions. *See* M. Bassiouni, *Interna-*

tional Extradition and World Public Order 425 (1974); C. Van den Wijngaert, *supra* p. 22, at 3; Garcia-Mora, *supra* p. 3, at 1226, 1238. Third, the exception comports with the notion that governments—and certainly their nonpolitical branches—should not intervene in the internal political struggles of other nations. *See* C. Van den Wijngaert, *supra* p. 22, at 3, 158, 204; *Politics of Extradition*, *supra* p. 31, at 622.[11]

B. Comparative Legal Standards

None of the political offense provisions in treaties includes a definition of the word "political." I.A. Shearer, *supra* p. 22, at 168. Thus, the term "political offense" has received various interpretations by courts since the mid-nineteenth century. Garcia-Mora, *supra*, p. 3 at 1230-31; Wise, *Book Review*, 30 Am. J. Comp. L. 362, 363 (1982) (reviewing C. Van den Wijngaert, *The Political Offense Exception to Extradition* (1980)); *cf.* M. Bassiouni, *supra* p. 32, at 371-72 (inability to define precisely the term "political offense" promotes a necessary flexibility of the concept). Not every offense that is politically motivated falls within the exception. Instead, courts have devised various tests to identify those offenses that comport with the justifications for the exception and that, accordingly, are not extraditable.

Within the confusion about definitions it is fairly well accepted that there are two distinct categories of political offenses: "pure political offenses" and "relative political offenses." *See Karadzole v. Artukovic*, 247 F.2d 198, 203 (9th Cir. 1957), *vacated*, 355 U.S. 393 (1958) (mem.); *see generally* Garcia-Mora, *supra* p. 3, at 1230; *20th Century American Courts*, *supra* p. 30, at 1009. Pure political offenses are acts aimed directly at the government, *see*

Lubet & Czackes, *supra* p. 3, at 200, and have none of the elements of ordinary crimes, Garcia-Mora, *supra* p. 3, at 1230. These offenses, which include treason, sedition, and espionage, Garcia-More, *supra* p. 3 at 1234; Lubet & Czackes, *supra* p. 3 at 200, do not violate the private rights of individuals, Garcia-Mora, *supra* p. 3, at 1237. Because they are frequently specifically excluded from the list of extraditable crimes given in a treaty, *see 20th Century American Courts, supra* p. 30, at 1009, courts seldom deal with whether these offenses are extraditable, *see id.*, and it is generally agreed that they are not, *see* Lubet & Czackes, *supra* p. 3, at 200 (citing *In re Ezeta,* 62 F. 972 (1894)).

The definitional problems focus around the second category of political offenses—the relative political offenses. These include "otherwise common crimes committed in connection with a political act," Lubet & Czackes, *supra* p. 3, at 200, or "common crimes . . . committed for political motives or in a political context," *20th Century American Courts, supra* p. 30, at 1009. Courts have developed various tests for ascertaining whether "the nexus between the crime and the political act is sufficiently close . . . [for the crime to be deemed] not extraditable." Lubet & Czackes, *supra* p. 3, at 200. The judicial approaches can be grouped into three distinct categories: (1) the French "objective" test; (2) the Swiss "proportionality" or "predominance" test; and (3) the Anglo-American "incidence" test. *See generally* Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created,* 1 Assoc. of Student Int'l L. Societies Int'l L.J. 1, 11-31 (1977)); Garcia-Mora, *supra* p. 3, at 1239-56; *20th Century American Courts, supra* p. 30, at 1009-17. More

recent developments allow for further distinctions between the British test and the test employed in the United States. *See generally* Lubet & Czackes, *supra* p. 3, at 201-10.

The early French test, most clearly represented in *In re Giovanni Gatti,* [1947] Ann. Dig. 145 (No. 70) (France, Ct. App. of Grenoble), considered an offense non-extraditable only if it directly injured the rights of the state. *See 20th Century American Courts, supra* p. 30, at 1010. Applying this rigid formula, French courts refused to consider the motives of the accused. Garcia-Mora, *supra* p. 3, at 1249-50. The test primarily protects only pure political offenses, *see id.* at 1235-36 (discussing cases), and is useless in attempts to define whether an otherwise common crime should not be extraditable because it is connected with a political act, motive, or context. *Id.* at 1252. Because politically motivated and directed acts may injure private as well as state rights, the objective test fails to satisfy the various purposes of the political offense exception. *Politics of Extradition, supra* p. 31, at 629-30. Nevertheless, this test has one benefit: because it is so limited, it is not subject to abuse; perpetrators of common crimes will not be protected because of alleged political motivations. *Id.* at 630; Garcia-Mora, *supra* p. 3, at 1251.[12]

In contrast to the traditional French test, Swiss courts apply a test that protects both pure and relative political offenses. The Swiss test examines the political motivation of the offender, *see* Garcia-More, *supra* p. 3, at 1251, but also requires (a) a consideration of the circumstances surrounding the commission of the crime, *see* Carbonneau, *supra* p. 34, at 23-26, and (b) either a proportionality between the means and the political ends; *see 20th Century*

American Courts, supra p. 30, at 1010-11, or a predominance of the political elements over the common crime elements, *see* Garcia-Mora, *supra* p. 3, at 1254.

At least one commentator has suggested that the first condition of the Swiss test is a requirement of a direct connection between the crime and the political goal—a condition that essentially requires the presence of a political movement. *See* Garcia-Mora, *supra* p. 3, at 1253 (citing Swiss cases). Others point out that the early Swiss requirement that a crime be incident to a political movement has been explicitly rejected in later cases. *See, e.g.,* Carbonneau, *supra* p. 34, at 26-28 (citing Swiss cases). More recent Swiss cases concentrate less on the accused's motive, relying instead almost entirely on an ends-means test under which politically motivated conduct is protected by the exception only if the danger created by the conduct is proportionate to the objectives, *i.e.,* if the means employed are the only means of accomplishing the end and the interests at stake are sufficiently important to justify the danger and harm to others. *See* Carbonneau, *supra* p. 34, at 28-29 (citing Swiss cases).

The comprehensiveness and flexibility of the "predominance" or "proportionality" test allows it to be conformed to changing realities of a modern world. *See* Garcia-Mora, *supra* p. 3, at 1255. But because the relative value of the ends and the necessity of using the chosen means must be considered, the criteria applied by Swiss courts incorporate highly subjective and partisan political considerations within the balancing test. *See* C. Van den Wijngaert, *supra* p. 22, at 158; *Politics of Extradition, supra* p. 31, at 631.[13] The test explicitly requires an evaluation of the importance of the interests at stake, the desirability of political change,

and the acceptability of the means used to achieve the ends. The infusion of ideological factors in the determination which offenses are non-extraditable threatens both the humanitarian objectives underlying the exception and the concern about foreign non-intervention in domestic political struggles. Moreover, it severely undermines the notion that such determinations can be made by an apolitical, unbiased judiciary concerned primarily with individual liberty. *See supra* pp. 20-22.[14]

The "incidence" test that is used to define a non-extraditable political offense in the United States and Great Britain was first set forth by the Divisional Court in *In re Castioni,* [1891] 1 Q.B. 149 (1890). In that case, the Swiss government requested that Great Britain extradite a Swiss citizen who, with a group of other angry citizens, had stormed the palace gates and killed a government official in the process. *Id.* at 150-51. Castioni did not know the victim or have a personal grudge against him. The habeas court considered:

> [W]hether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and [up]rising in which he was taking part.

Id. at 159 (per Denman, J.). The court denied extradition, finding that Castioni's actions were "incidental to and formed a part of political disturbances," *id.* at 166 (per Hawkins, J.), and holding that common crimes committed "in the course" and "in the furtherance" of a political disturbance would be treated as political offenses, *id.* at 156 (per Denman, J.).

Although both the United States and Great Britain rely explicitly on *Castioni,* each has developed its own version of the incidence test. British courts proceeded first to narrow the exception in 1894. In *In re Meunier,* (1894) 2 Q.B. 415, the court extradited a French anarchist charged with bombing a cafe and military barracks, *id.* at 415, concluding that anarchist action is not incident to a two-party struggle for political power, *id.* at 419 (per Cave, J.). The court held that the political offense exception protects those who seek to substitute one form of government for another, not those whose actions disrupt the social order and whose "efforts are directed primarily against the general body of citizens." *Id.*

The rigid "two-party struggle" requirement of the British incidence test has not survived. More recently, British courts have taken other factors into account, noting that political offenses must be considered "according to the circumstances existing at the time." *Regina v. Governor of Brixton Prison (ex parte Kolczynski),* [1955] 1 Q.B. 540, 549 (1954) (per Cassels, J.). In *Kolczynski,* a British court refused to extradite Polish soldiers who were at risk of being punished for treason although the Polish government officially sought their extradition for common crimes. *See id.* at 543, 545. No political uprising existed at the time the crimes were committed. *Id.* at 544. Instead of a distinct uprising, the new British incidence test requires some "political opposition . . . between fugitive and requesting State," *Schtraks v. Government of Israel,* [1964] A.C. 556, 591 (1962) (per Viscount Radcliffe), and incorporates an examination of the motives of the accused and the requesting country in those situations in which the offense is not part of an uprising, *see* Lubet & Czackes, *supra* p. 3, at 202-03.[15]

C. Original Formulation of the United States Incidence Test

The United States, in contrast to Great Britain, has adhered more closely to the *Castioni* test in determining whether conduct is protected by the political offense exception. The seminal United States case in this area is *In re Ezeta,* 62 F. 972 (N.D. Cal. 1894), in which the Salvadoran government requested the extradition of a number of individuals accused of murder and robbery. The fugitives maintained that the crimes had been committed while they unsuccessfully attempted to thwart a revolution. *See id.* at 995. Extradition was denied because the acts were "committed during the progress of actual hostilities between contending forces," *id.* at 997, and were "closely identified" with the uprising "in an unsuccessful effort to suppress it," *id.* at 1002. However, an alleged act that occurred four months prior to the start of armed violence was held not to be protected by the incidence test despite the accused's contention that El Salvador's extradition request was politically motivated. *Id.* at 986.[16]

As we noted at the outset, the Supreme Court has addressed the political offense issue only once. In *Ornelas v. Ruiz,* 161 U.S. 502 (1896), Mexico sought the extradition of an individual for murder, arson, robbery, and kidnapping committed in a Mexican border town, at or about the time revolutionary activity was in progress. *Id.* at 510. The Court allowed extradition on the basis that the habeas court had applied an improper, non-deferential standard of review to the extradition court's findings. *Id.* at 511-12. It continued by listing four factors pertinent to the political offense inquiry in the case: (1) the character of the foray;

(2) the mode of attack; (3) the persons killed or captured; and (4) the kind of property taken or destroyed. *Id.* at 511. It found that although the raid (in December 1892) may have been contemporaneous with a revolutionary movement (in 1891), it was not of a political character because it was essentially unrelated to the uprising. The Court noted that the purported political aspects of the crimes were negated "by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas." *Id.*

Since *Ornelas,* lower American courts have continued to apply the incidence test set forth in *Castioni* and *Ezeta* with its two-fold requirement: (1) the occurrence of an uprising or other violent political disturbance[17] at the time of the charged offense, *see, e.g., Garcia-Guillern v. United States,* 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972); *Ramos v. Diaz,* 179 F. Supp. 459, 462 (S.D. Fla. 1959),[18] and (2) a charged offense that is "incidental to" "in the course of," or "in furtherance of" the uprising, *see, e.g., Eain,* 641 F.2d at 518; *Sindona v. Grant,* 619 F.2d 167, 173 (2d Cir. 1980); *Garcia-Guillern,* 450 F.2d at 1192. While the American view that an uprising must exist is more restrictive than the modern British view and while we, unlike the British, remain hesitant to consider the motives of the accused or the requesting state, *see* Lubet & Czackes, *supra* p. 3, at 203, 205, American courts have been rather liberal in their construction of the requirement that the act be "incidental to" an uprising, *see* Garcia-Mora, *supra* p. 3, at 1244.

The American approach has been criticized as being "both underinclusive and overinclusive," *see* Lubet & Czackes, *supra* p. 3, at 203, and as "yield[ing] anomalous . . . results," *see 20th Century American Courts, supra* p. 30, at 1013-14. Although these criticisms have some merit, neither flaw in the American incidence test is serious. Some commentators have suggested that the test is underinclusive because it exempts from judicially guaranteed protection all offenses that are not contemporaneous with an uprising even though the acts may represent legitimate political resistance. *See, e.g.,* Lubet & Czackes, *supra* p. 3, at 203-04. For example, the attempted kidnapping of a Cuban consul, allegedly for the purpose of ransoming the consul for political prisoners held in Cuba, was held by a court not to be a political offense because the act was not "committed in the course of and incidental to a violent political disturbance." *Escobedo v. United States,* 623 F.2d 1098, 1104 (5th Cir.), *cert. denied,* 449 U.S. 1036 (1980).

There are several responses to the charge of underinclusiveness. First, in their critiques, the commentators fail to give sufficient weight to the existence of a number of ameliorative safeguards. For example, review of certifications of extradition by the Secretary of State, *see supra* pp. 23-24, serves partially to remedy any underinclusiveness problem. If a court finds the accused extraditable, the Secretary has, at the very least, broad discretion to review the available record and conduct a *de novo* examination of the issues and, if necessary, to consider matters outside the record in determining whether to extradite. *See* Lubet & Czackes, *supra* p. 3, at 199. The potential underinclusiveness dangers of the uprising requirement are also mitigated by the fact that purely political offenses are never extra-

ditable. *See id.* at 206; *supra* pp. 33-34. Additionally, because of the rule of dual criminality, *see supra* p. 5, individuals accused of offenses that constitute protected activity under the First Amendment will not be extradited. *See* Lubet & Czakes, *supra* p. 3, at 206. Second, it is questionable whether the incidence test is, in fact, underinclusive. While it does not protect all politically motivated offenses, it protects those acts that are related to a collective attempt to abolish or alter the government—the form of political offense that the exception was initially designed to protect, *see supra* pp. 31-32. Third, any effort to protect all crimes that are in some way politically motivated would either require the abandonment of the objective test for determining which offenses fall within the exception—in our view a most undesirable result—or would result in the protection of innumerable crimes that fall far outside the original purposes underlying the exception.

A number of commentators suggest, on the other hand, that the American test is overbroad because it makes nonextraditable some offenses that are not of a political character merely because the crimes took place contemporaneously with an uprising. *See* Garcia-Mora, *supra* p. 3, at 1246; Lubet & Czackes, *supra* p. 3, at 205; *Politics of Extradition, supra* p. 31, at 628. We think these commentators misunderstand the test. They all cite *Karadzole v. Artukovic,* 247 F.2d 198 (9th Cir. 1957)—"one of the most roundly criticized cases in the history of American extradition jurisprudence," *Eain v. Wilkes,* 641 F. 2d 504, 522 (7th Cir.), *cert. denied,* 454 U.S. 894 (1981)—to support their argument.[19] In *Artukovic,* the Yugoslavian government sought the extradition of a former Minister of the Interior of the puppet Croatian government which took over a portion of

Yugoslavia following the German invasion in April 1941. Artukovic was charged with directing the murder of hundreds of thousands of civilians in concentration camps between April 1941 and October 1942. Prior to a hearing by an extradition magistrate, the district court granted habeas relief, concluding that the charged offenses were non-extraditable political offenses. *Artukovic v. Boyle,* 140 F. Supp. 245, 246 (S.D. Cal. 1956). We affirmed, applying the *Castioni* language and noting that the offenses occurred during the German invasion of Yugoslavia and subsequent establishment of Croatia. *Karadzole v. Artukovic,* 247 F.2d 198, 202-04 (9th Cir. 1957). We considered but were unpersuaded by the argument that because war crimes are so barbaric and atrocious they cannot be considered political crimes, *see id.* at 204, and that United Nations resolutions called for the extradition of war criminals, *see id.* at 205.

The Supreme Court vacated our opinion in a one paragraph per curiam opinion and remanded for an extradition hearing pursuant to 18 U.S.C. § 3184. *See* 355 U.S. 393 (1958). The Court did not comment on the substantive issues and may well have based its order solely on the fact that the habeas court considered the legal questions involved in Artukovic's extradition before an extradition court had an opportunity to make the preliminary findings mandated by section 3184. *See United States v. Artukovic,* 170 F. Supp. 383, 393 (S.D. Cal. 1959). In his subsequent decision the magistrate denied extradition on the ground that there was insufficient evidence to establish probable cause of Artukovic's guilt, *see id.* at 392, but in dicta he adopted our vacated political offense analysis, *see id.* at 393.[20]

We do not believe that *Artukovic* adequately supports the commentators' suggestion that the incidence test is overinclusive. We think it more likely that the problem lies not in the test itself but in the fact that we erred by applying it in that case.

The offenses with which Artukovic was charged fall within that very limited category of acts which have been labeled "crimes against humanity." In *Artukovic* we erroneously assumed that "crimes against humanity" was synonymous with "war crimes," and then concluded in a somewhat irrelevant fashion that not all war crimes automatically fall outside the ambit of the political offense exception. *See* 247 F.2d at 204. Our analysis was less than persuasive. We did not need then, and do not need now, to reach a conclusion about whether all war crimes fall outside the bounds of the exception. *Cf.* C. Van den Wijngaert, *supra* p. 22, at 143 (suggesting that, under internaitonal law, states remain free to consider war crimes as political offenses). The offenses with which Artukovic was charged were crimes against humanity; it matters not whether or not they were also war crimes; either way, crimes of that magnitude are not protected by the exception.

Crimes against humanity, such as genocide, violate international law[21] and constitute an "abuse of sovereignty" because, by definition, they are carried out by or with the toleration of authorities of a state.[22] While some of the same offenses that violate the laws and customs of war[23] are also crimes against humanity, crimes of the latter sort most notably include "murder, extermination, enslavement, . . . or persecutions on political, racial or religious

grounds . . ." of entire racial, ethnic, national or religious groups. *The Nurnberg (Nuremberg) Trial,* 6 F.R.D. 69, 130 (Int'l Military Tribunal 1946). Various "inhumane acts . . . committed after the beginning of [World War II] did not constitute war crimes, [but] . . . constituted crimes against humanity." *Id.* at 131.

Wholely aside from the *Artukovic* court's confusion of "war crimes" and "crimes against humanity," we do not believe that the political offense exception, even if meant to protect the acts of representatives of a former government,[24] should have been extended to protect those carrying out a governmental policy calling for acts of destruction whose "nature and scope . . . exceeded human imagination," *Excerpts from Speech by German President,* N.Y. Times, May 9, 1985, at 10, col. 1, 3 (excerpts from Speech to Parliament on May 8, 1985 by President Richard von Weizsacker, as translated by the West German Foreign Ministry) (noting that the Nazi genocide is "unparalled in history"). These crimes are simply treated differently and are generally excluded from the protection of many normally applicable rules. *See, e.g., The Nurnberg (Nuremberg) Trial,* 6 F.R.D. at 107-11 (individuals accused of these offenses can be tried before international tribunal because offenses violate international law). They are certainly in our view to be excluded from coverage under the political offense exception.

Accordingly, we do not consider the "underinclusiveness" and "overinclusiveness" problems of the incidence test to have been as severe as has been suggested by some of the commentators. Rather, we believe that the incidence test, when properly applied, has served the purposes and

objectives of the political offense exception well. More recently, a number of courts have begun to question whether, in light of changing political practices and realities, we should continue to use the traditional American version of that test. They have suggested that basic modifications may be required and, specifically, that certain types of conduct engaged in by some contemporary insurgent groups, conduct that we in our society find unacceptable, should be excluded from coverage. For the reasons we explain below, we believe that the American test in its present form remains not only workable but desirable; that the most significant problems that concern those advocating changes in the test can be dealt with without making the changes they propose; and that efforts to modify the test along the lines suggested would plunge our judiciary into a political morass and require the type of subjective judgments we have so wisely avoided until now.

D. The Recent Political Offense Cases

Recently, the American judiciary has split almost evenly over whether the traditional American incidence test should be applied to new methods of political violence in two categories—domestic revolutionary violence and international terrorism—or whether fundamental new restrictions should be imposed on the use of the political offense exception.

In both *In re McMullen*, No. 3-78-1099 MG (N.D. Cal. May 11, 1979), and *In re Mackin*, No. 80 Cr. Misc. 1 (S.D. N.Y. Aug. 13. 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981), extradition magistrates applied the traditional

United States incidence test despite expressing serious concern over the nature of the charged offenses. In *McMullen,* the United Kingdom sought the extradition of a former PIRA member accused of murder in connection with the bombing of a military barracks in England. Finding that McMullen's acts took place during a state of uprising throughout the United Kingdom and were incidental to the political disturbance, the magistrate denied extradition noting that "[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these pre-requisites." Slip op. at 3.[25] The magistrate's formulation of the test for the political offense exception in *Mackin* was similar.[26] In that case, the United Kingdom's request for the extradition of an IRA member accused of murdering a British soldier in Northern Ireland was denied.[27]

In contrast, although asserting that the existing incidence test "is sufficiently flexible to avoid [the] abuses [noted by commentators]," 641 F.2d at 519, and while ostensibly applying the traditional test, *see id.* at 515-16, 518, the Seventh Circuit in *Eain v. Wilkes,* 641 F.2d 504 (7th Cir.), *cert. denied,* 454 U.S. 894 (1981), superimposed a number of limitations on the exception that had not previously been a part of United States law. Abu Eain, a resident of the occupied West Bank and a member of the PLO, was accused by the State of Israel of setting a bomb that exploded in the Israeli city of Tiberias in 1979, killing two boys and injuring more than thirty other people. A magistrate granted Israel's extradition request, the district court denied habeas corpus relief, and the Seventh Circuit affirmed.

First, the *Eain* court distinguished between conflicts that involved "on-going, organized battles between contending armies," 641 F.2d at 519, and conflicts that involved groups with "the dispersed nature of the PLO," *id.*, noting that in the former case, unlike the latter, a clear distinction can be drawn between the activities of the military forces and individual acts of violence. Second, although acknowledging that motivation is not determinative of the political character of an act, *see id.* at 520 (citing Lubet & Czackes, *supra* p. 3, at 203 n. 102), and characterizing its next requirement as that of a "direct link" between the offense and the conflict, *id.* at 521, the court examined the motivation for and political legitimacy of the act. The court appears to have concluded that, according to the evidence presented, the PLO's objectives were not politically legitimate: the PLO sought changes in "the Israeli political structure as an incident of the expulsion of a certain population from the country," *id.* at 520, and its activities were therefore more properly characterized as aimed at Israel's "social structure" rather that its "political structure," *id.* Third, the court held simply that regardless what the political objective is, "the indiscriminate bombing of a civilian population is not recognized as a protected political act." *Id.* at 521.

Thus, the Seventh Circuit in *Eain* redefined an "uprising" as a struggle between organized, non-dispersed military forces; made a policy determination regarding the legitimacy of given political objectives;[28] and excluded violent acts against innocent civilians[29] from the protection afforded by the exception. *Cf.* Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 Va. J. Int'l L. 163, 177-78 (1980)

(criticizing *Eain* magistrate's test because it invites ideological and foreign policy determinations by extradition courts). As part of its justification for the new limitations it imposed on the applicability of the exception, the *Eain* court expressed concern that, in the absence of these restrictions,

> nothing would prevent as influx of terrorists seeking a safe haven in America. . . . Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. . . . [T]he political offense exception . . . should be applied with great care lest our country, become a social jungle . . . .

Id. at 520.

The District Court for the Southern District of New York has recently rejected portions of the *Eain* analysis but accepted some of the new restrictions propounded by the Seventh Circuit. In *In re Doherty,* 599 F. Supp. 270 (S.D.N.Y. 1984), the court denied the United Kingdom's request that a PIRA member accused of attacking a convoy of British soldiers in Northern Ireland be extradited. The extradition court rejected the notion that the exception protects only "actual armed insurrections or more traditional and overt military hostilities." *Id.* at 275. Noting that "political struggles have been . . . effectively carried out by armed guerillas," *id.*, the court concluded that a dissident group's likelihood of success and its ability to effect changes by other than violent means were not determinative factors. *Id.* Nevertheless, the court agreed with the Seventh Circuit's tacit conclusion that the traditional incidence test is "hardly consistent with . . . the realities of the modern world," *id.* at 274.

The *Doherty* court continued by approving of the *Eain* court's willingness to balance policy considerations so that the exception "does not afford a haven for persons who commit the most heinous atrocities for political ends." *Id.* at 275 n.4. Although such issues were not raised in *Doherty*, the court stated explicitly that the exception would not protect bombings in public places, *id.* at 275; acts that "transcend the limits of international law," *id.;* acts "inconsistent with international standards of civilized conduct," *id.* at 274; harm to hostages, *id.* at 276; violations of the Geneva convention, *id.;* or the acts of "amorphous" or "fanatic" groups without structure, organization, or clearly defined political objectives, *id.* Thus, the *Doherty* court, like the *Eain* court, concluded that the traditional incidence test is insufficient to determine which offenses are protected by the exception. Both courts felt it necessary and appropriate to judge the political legitimacy of various ends and means and to exclude "illegitimate" acts from protection even if the incidence test were met. While not identifying their new limitations as such, both incorporated significant aspects of the Swiss ends-means or proportionality test into Anglo-American jurisprudence.

V. THE POLITICAL OFFENSE EXCEPTION AND THE REALITIES OF CONTEMPORARY POLITICAL STRUGGLES

A. The Political Reality: The Contours of Contemporary Revolutionary Activity

The recent lack of consensus among United States courts confronted with requests for the extradition of those accused of violent political acts committed outside the context of an organized military conflict reflects some confusion about the purposes underlying the political of-

fense exception. *See supra* pp. 31-32. The premise of the analyses performed by modern courts favoring the adoption of new restrictions on the use of the exception is either that the objectives of revolutionary violence undertaken by dispersed forces and directed at civilians are by definition, not political, *see, e.g., Eain,* 641 F.2d at 519 ("Terrorist activity seeks to promote social chaos."), or that, regardless of the actors' objectives, the conduct is not politically legitimate because it "is inconsistent with international standards of civilized conduct," *Doherty,* 599 F. Supp. at 274. Both assumptions are subject to debate.

A number of courts appear tacitly to accept a suggestion by some commentators that begins with the observation that the political offense exception can be traced to the rise of democratic governments. *See* I.A. Shearer, *supra* p. 22, at 166; C. Van den Wijngaert, *supra* p. 22, at 100; Carbonneau, *supra* p. 34, at 5. Because of this origin, these commentators argue, the exception was only designed to protect the right to rebel against tyrannical governments, *see e.g.,* Epps, *supra* p. 4, at 65, and should not be applied in an ideologically neutral fashion, *see e.g.,* Carbonneau, *supra* p. 34, at 44; *see also In re Gonzales,* 217 F. Supp. 717, 721 n.9 (S.D.N.Y. 1963) (evaluating whether acts in question "were blows struck in the cause of freedom against repressive totalitarian regime"). *But see* C. Van den Wijngaert, *supra* p. 22, at 102 (noting that democratic states may also supress political conduct in the guise of criminality).

These courts then proceed to apply the exception in a non-neutral fashion but, in doing so, focus on and explicitly reject only the *tactics,* rather than the true object of their

concern, the political *objectives. See* C. Van den Wijngaert, *supra* p. 22, at 102. The courts that are narrowing the applicability of the exception in this manner appear to be moving beyond the role of an impartial judiciary by determining tacitly that particular political objectives are not "legitimate."

We strongly believe that courts should not undertake such a task. The political offense test traditionally articulated by American courts, as well as the text of the treaty provisions, *see, e.g., Treaty, supra* p. 1, at art. V(1)(c), is ideologically neutral. We do not believe it appropriate to make qualitative judgments regarding a foreign government or a struggle designed to alter that government. *Accord In re Doherty,* 599 F. Supp. 270, 277 (S.D.N.Y. 1984); *see generally supra* note 6. Such judgments themselves cannot be other than political and, as such, involve determinations of the sort that are not within the judicial role. *See supra* Section II.B.

A second premise may underlie the analyses of court that appear to favor narrowing the exception, namely, that modern revolutionary *tactics* which include violence directed at civilians are not politically "legitimate." This assumption, which may well constitute an understandable response to the recent rise of international terrorism, skews any political offense analysis because of an inherent conceptual shortcoming. In deciding what tactics are acceptable, we seek to impose on other nations and cultures our own traditional notions of how internal political struggles should be conducted.

The structure of societies and governments, the relationships between nations and their citizens, and the modes

of altering political structures have changed dramatically since our courts first adopted the *Castioni* test. Neither wars nor revolutions are conducted in as clear-cut or mannerly a fashion as they once were. Both the nature of the acts committed in struggles for self-determination, *see* M. Bassiouni, *International Extradition: United States Law & Practice,* ch. VIII, at §§ 2-71 to 2-72, and the geographic location of those struggles have changed considerably since the time of the French and American revolutions. Now challenges by insurgent movements to the existing order take place most frequently in Third World countries rather than in Europe or North America. In contrast to the organized, clearly identifiable, armed forces of past revolutions, today's struggles are often carried out by networks of individuals joined only by a common interest in opposing those in power.

It is understandable that Americans are offended by the tactics used by many of those seeking to change their governments. Often these tactics are employed by persons who do not share our cultural and social values or mores. Sometimes they are employed by those whose views of the nature, importance, or relevance of individual human life differ radically from ours. Nevertheless, it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal.

Politically motivated violence, carried out by dispersed forces and directed at private sector institutions, structures, or civilians, is often undertaken—like the more organized, better disciplined violence of preceding revolutions—as part of an effort to gain the right to self-government. *See Politics of Extradition, supra* p. 31, at 632-33. We believe the tactics that are used in such internal political struggles are simply irrelevant to the question whether the political offense exception is applicable.

B. Relationship Between the Justifications for the Exception, the Incidence Test, and Contemporary Political Realities

One of the principal reasons our courts have had difficulty with the concept of affording certain contemporary revoluntionary tactics the protection of the political offense exception is our fear and loathing of international terrorism. *See, e.g., Eain,* 641 F.2d at 520. The desire to exclude international terrorists from the coverage of the political offense exception is a legitimate one; the United States unequivocally condemns all international terrorism.[30] However, the restrictions that some courts have adopted in order to remove terrorist activities from coverage under the political offense exception are overbroad. As we have noted, not all politically-motivated violence undertaken by dispersed forces and directed at civilians is international terrorism and not all such activity should be exempted from the protection afforded by the exception.

Although it was not accepted as international law, the position of the United States, not only on international

terrorism but also on the extradition of international terrorists, was made clear in 1972 when it introduced its Draft Convention on Terrorism in the United States. *See* U.N. Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism: United States Working Paper, U.N. Doc. A/C.6/L.850 (September 25, 1972), *reprinted in* 1 R. Friedlander, *Terrorism: Documents of International and Local Control* 487 (1979). The Draft Convention calls either for trial of international terrorists in the State where found or for their extradition. *See id.* at art. 3; *see also* 1984 Act to Combat International Terrorism § 201, Pub. L. 98-533, 96 Stat. 2706, 2709 (to be codified at 18 U.S.C. § 3077) (reaffirming United States' position on the extradition of international terrorists).

The policy and legal considerations that underlie our responses to acts of international terrorism differ dramatically from those that form the basis for our attitudes toward violent acts committed as a part of other nations' internal political struggles. The application of the political offense exception to acts of domestic political violence comports in every respect with both the original justifications for the exception and the traditional requirements of the incidence test.[31] The application of that exception to acts of international terrorism would comport with neither. First, we doubt whether the designers of the exception contemplated that it would protect acts of international violence, regardless of the ultimate objective of the actors. Second, in cases of international terrorism, we are being asked to return the accused to the government in the country where the acts were committed: frequently that is not a government the accused has sought

to change. In such cases there is less risk that the accused will be subjected to an unfair trial or punishment because of his political opinion.[32] Third, the exception was designed, in part, to protect against foreign intervention in internal struggles for political self-determination. When we extradite an individual accused of international terrorism, we are not interfering with any *internal* struggle; rather, it is the international terrorist who has interfered with the rights of others to exist peacefully under their chosen form of government.

There is no need to create a new mechanism for defining "political offenses" in order to ensure that the two important objectives we have been considering are met: (a) that international terrorists will be subject to extradition, and (b) that the exception will continue to cover the type of domestic revolutionary conduct that inspired its creation in the first place. While the precedent that guides us is limited, the applicable principles of law are clear. The incidence test has served us well and requires no significant modification. The growing problem of international terrorism, serious as it is, does not compel us to reconsider or redefine that test. The test we have used since the 1800's simply does not cover acts of international terrorism.

1. *The "Incidence" Test*

As all of the various tests for determining whether an offense is extraditable make clear, not every offense of a political character is non-extraditable. In the United States, an offense must meet the incidence test which is intended, like the tests designed by other nations, to com-

port with the justifications for the exception. We now explain the reasons for our conclusion that the traditional United States incidence test by its terms (a) protects acts of domestic violence in connection with a struggle for political self-determination, but (b) was not intended to and does not protect acts of international terrorism.

2. *The "Uprising" Component*

The incidence test has two components—the "uprising" requirement and the "incidental to" requirement. The first component, the requirement that there be an "uprising," "rebellion," or "revolution," has not been the subject of much discussion in the literature, although it is firmly established in the case law, *see supra* note 1. Most analyses of whether the exception applies have focused on whether the act in question was in furtherance of or incidential to a given uprising. Nevertheless, it is the "uprising" component that plays the key role in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect.

As we have noted, the political offense doctrine developed out of a concern for the welfare of those engaged in a particular form of political activity—an effort to alter or abolish the government that controls their lives—and not out of a desire to protect all politically motivated violence. *See In re Ezeta,* 62 F. 972, 998 (N.D. Cal. 1894) ("'Any offense committed in the course of or furthering of civil war, insurrection, or political commotion.'") (quoting John Stuart Mill); *In re Castioni,* [1891] 1 Q.B. 149, 156 (1890) ("a sort of overt act in the course of acting

in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hand'') (per Denman, J.).

The uprising component serves to limit the exception to its historic purposes. It makes the exception applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective. The exception does not apply to political acts that involve less fundamental efforts to accomplish change or that do not attract sufficient adherents to create the requisite amount of turmoil. *See Escobedo v. United States,* 623 F.2d 1098 (5th Cir.), *cert. denied,* 449 U.S. 1036 (1980). Thus. acts such as skyjacking (an act that has never been used by revolutionaries to bring about a change in the composition or structure of the government in their own country) fall outside the scope of the exception.

Equally important, the uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term ''uprising'' refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occur only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising. The political offense exception was designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power. It was not designed to protect international political coercion or blackmail, or the exportation of vio-

lence and strife to other locations—even to the homeland of an oppressor nation. Thus, an uprising is not only limited temporally, it is limited spatially. *See 20th Century American Courts, supra* p. 30, at 1021 n. 115.

In his concurring opinion, Judge Duniway points out that the limitation to acts occurring within the territory in which there is an uprising means that persons committing acts of piracy, terrorism, or other crimes on the high seas will be unable to invoke the protection of the political offense exception. His observation is correct. Just as skyjackers and other international terrorists are not protected under the exception, neither are persons who commit or threaten to commit violent crimes on the high seas. The political offense exception was never intended to reach such conduct.

While determining the proper geographic boundaries of an "uprising" involves a legal issue that ordinarily will be fairly simple to resolve, there may be some circumstances under which it will be more difficult to do so. We need not formulate a general rule that will be applicable to all situations. It is sufficient in this case to state that for purposes of the political offense exception an "uprising" cannot extend beyond the borders of the country or territory in which a group of citizens or residents is seeking to change their particular government or governmental structure.

It follows from what we have said that an "uprising" can exist only when the turmoil that warrants that characterization is created by nationals of the land in which the disturbances are occurring. Viewed in that light, it becomes clear that had the traditional incidence test been

applied in *Eain,* discussed *supra* pp. 50-52, the result would have been identical to that reached by the Seventh Circuit. When PLO members enter Israel and commit unlawful acts, there is simply no uprising for the acts to be incidental to. The plain fact is that the Israelis are not engaged in revolutionary activity directed against their own government. They are not seeking to change its form, structure, or composition through violent means. That the PLO members who commit crimes are seeking to destroy Israel as a state does not help bring them within the political offense exception. In the absence of an uprising, the violence engaged in by PLO members in Israel and elsewhere does not meet the incidence test and is not covered by the political offense exception. To the contrary, the PLO's worldwide campaign of violence, including the crimes its members commit in the state of Israel, clearly constitutes "international terrorism."

Moreover, Eain's conduct may have fallen outside the political offense exception for an additional, though related, reason. Not only was there no uprising in Israel, but Eain himself was not a national of that country. It is not clear whether, even when the violence is primarily conducted by nationals and thus an uprising may properly be found to exist, a foreign citizen who voluntarily joins the fray is protected by the exception. The exception was designed to protect those seeking to change their own government or to oust an occupying power that is asserting sovereignty over them. We question whether it should apply when the accused is not a citizen of the country or territory in which the uprising is occurring. In the absence of a tangible demonstration that he or she has more

than a transitory connection with that land, the acts of a foreign national may simply not qualify for protection.

Although we find substantial merit to the argument that foreign nationals should be excluded from coverage under the political offense exception, the incidence test has never previously been analyzed in a manner that considers the question in any detail. Because of the conclusion we reach with respect to other issues in the case before us, there is no need for us to answer the question here. Accordingly, we leave its resolution to a subsequent time. It is enough for our purposes merely to note that the fact that Eain was not an Israeli might well have constituted another basis for holding that his conduct was not protected under the incidence test.

In short, the *Eain* and *Doherty* courts' objective that this country not become a haven for international terrorists can readily be met through a proper application of the incidence test. It is met by interpreting the political offense exception in light of its historic origins and goals. Such a construction excludes acts of international terorism. There is no reason, therefore, to construe the incidence test in a subjective and judgmental manner that excludes all violent political conduct of which we disapprove. Moreover, any such construction would necessarily exclude some forms of internal revolutionary conduct and thus run contrary to the exception's fundamental purpose.[33] For that reason, we reject the *Eain* test and especially the concept that courts may determine whether particular forms of conduct constitute acceptable means or methods of engaging in an uprising.

3. *The "Incidental to" Component*

When describing the second requirement of the incidence test, the "incidental to" component, American courts have used the phrases "in the course of," "connected to," and "in furtherance of" interchangeably. We have applied a rather liberal standard when determining whether this part of the test has been met and have been willing to examine all of the circumstances surrounding the commission of the crime. *Garcia-Guillern v. United States,* 450 F.2d 1189, 1192 (5th Cir. 1971), *cert denied,* 405 U.S. 989 (1972); *Ramos v. Diaz,* 179 F. Supp. 459, 463 (S.D. Fla. 1959).

Commentators have criticized United States courts for applying the "incidental to" component too loosely or flexibly. *See supra* p. 42. We disagree with this criticism. To put the matter in its proper context, it is necessary to bear in mind that the offense must occur in the context of an "uprising." Acts "incidental to" an uprising are, as we have noted, limited by the geographic confines of the uprising. In addition, the act must be contemporaneous with the uprising. Moreover, the "incidental to" component is not satisfied by "any connection, however feeble, between a common crime and a political disturbance," Garcia-Mora, *supra* p. 3, at 1244. The act must be causally or ideologically related to the uprising. *See, e.g., Ornelas v. Ruiz,* 161 U.S. 502, 511 (1896) (concluding that rapid withdrawal of bandits after foray, in absence of threatening armed forces, suggested that acts were not incidental to uprising).

We believe the traditional liberal construction of the requirement that there be a nexus between the act and the uprising, *see supra* p. 42, is appropriate. There are various types of acts that, when committed in the course of an uprising, are likely to have been politically motivated. There

is little reason, under such circumstances, to impose a strict nexus standard. Moreover, the application of a strict test would in some instances jeopardize the rights of the accused.

Under the liberal nexus standard, neither proof of the potential or actual effectiveness of the actions in achieving the group's political ends, *In re Castioni,* [1891] 1 Q.B. 149, 158-59 (1890) (refusing to consider whether the act was a wise mode of promoting the cause) (per Denman, J.), nor proof of the motive of the accused, *Eain,* 641 F.2d at 519, or the requesting nation, *Garcia-Guillern,* 450 F.2d at 1192; *Ramos v. Diaz,* 179 F. Supp. at 463, is required. Nor is the organization or hierachy of the uprising group or the accused's membership in any such group determinative. *See Eain,* 641 F.2d at 519.

When extradition is sought, the "offender" at this stage in the proceedings has ordinarily only been accused, not convicted, of the offense. It would be inconsistent with the rights of the accused to require proof of membership in an uprising group. For example, the accused might be able to show that the acts were incidental to the uprising but might be unable to prove membership because he or she did not commit the offense or was not a member of the group. Furthermore, requiring proof of membership might violate the accused's Fifth Amendment rights both because it might force him to supply circumstantial evidence of guilt of the charged offense and because membership in the group itself might be illegal. Also, we question how one proves membership in an uprising group. Uprising groups often do not have formal organizational structures or document membership. In addition, it is entirely possible to sym-

pathize with, aid, assist, or support a group, help further its objectives and its activities, participate in its projects, or carry on parallel activities of one's own, without becoming a member of the organization. Still, one may be acting in furtherance of an uprising.

On the other hand, a number of factors, though not necessary to the nexus determination, may play a part in evaluating the circumstances surrounding the commission of the offense. For example, proof of membership in an uprising group may make it more likely that the act was incidental to the uprising. *See, e.g., Ramos v. Diaz,* 179 F. Supp. at 463; *Castioni,* 1 Q.B. at 157-59 (per Denman, J.). The similarity of the charged offense to other acts committed by the uprising group, and the degree of control over the accused's acts by some hierarchy within the group, may give further credence to the claim that the act was incidental to the uprising. And while evidence of the accused's political motivation is not required and is usually unavailable, evidence that an act was "committed for purely personal reasons such as vengeance or vindictiveness," *In re Doherty,* 599 F. Supp. 270, 277 n.7 (S.D.N.Y. 1984), may serve to rebut any presumption that a nexus exists. The exception is not designed to protect mercenaries or others acting for non-political motives.

Under the liberal nexus test we have traditionally applied, or even under a strict nexus standard, there is no justification for distinguishing, as *Doherty* suggests, between attacks on military and civilian targets. The "incidental to" component, like the incidence test as a whole, must be applied in an objective, non-judgmental manner. It is for the revolutionaries, not the courts, to determine what tactics may help further their chances of bringing down or

changing the government. All that the courts should do is determine whether the conduct is related to or connected with the insurgent activity. It is clear that various "non-military" offenses, including acts as disparate as stealing food to sustain the combatants, killing to avoid disclosure of strategies, or killing simply to avoid capture, may be incidental to or in furtherance of an uprising. To conclude that attacks on the military are protected by the exception, but that attacks on private sector institutions and civilians are not, ignores the nature and purpose of the test we apply, as well as the realities of contemporary domestic revolutionary struggles. *See supra* pp. 57-59.

We should add that the spatial limitations imposed under the "uprising" component may not be circumvented by reliance on the "incidental to" component. As we said earlier, for the political offense exception to be applicable at all, the crime must have occurred in the country or territory in which the uprising was taking place, not in a different geographic location. *See supra* pp. 64-65.

VI. *THE INCIDENCE TEST APPLIED TO THE CHARGED OFFENSES*

A. The Magistrate's Factual Findings and Legal Conclusions

In disposing of this case, the extradition magistrate first made a legal determination that the incidence test has three prongs, the latter two of which are "flip sides of the same question": (a) the existence of an uprising; (b) that the charged offense be in furtherance of that uprising; (c) and that the accused be a member of the uprising group. In evaluating the applicability of the first prong to the instant case, the magistrate made a number of factual findings, a

legal determination, and a conclusion based on the mixed fact and law determinations. First, the magistrate found that there was a violent political uprising in Northern Ireland at the time of the commission of the crimes with which Quinn is charged. He also noted that, were his inquiry limited to conditions in London, he would "find that the severity of the political disturbance [in London] was insufficiently grave to bring into play the political offense exception." The magistrate then made a legal determination that because Northern Ireland and London are both constitutionally a part of the United Kingdom, and because offenses committed in both geographic areas are directed against the same sovereign, he must consider the United Kingdom as a whole. Accordingly, he determined that a political uprising existed throughout the United Kingdom.

In applying the second and third prongs of his test the magistrate made the factual finding that Quinn was a member of a conspiracy involving the Balcombe Street Four, who were convicted on nineteen counts of bombing and shooting attacks, and that the case against the four was based on the theory that they were members of an Active Service Unit. The magistrate concluded, however, that this was an insufficient basis for considering the offenses to be "in furtherance of" the uprising. First, the magistrate held that membership in the uprising group is a necessary component of the incidence test, and that Quinn's IRA membership and involvement in an ASU conspiracy were insufficient to establish that he was a member of the PIRA, the group that the magistrate labeled the uprising group in this case. Next, the magistrate held that Quinn had failed to establish that the bombings were in furtherance of the PIRA's political goals (a) because he failed to

show that they were ordered by the command within the PIRA hierarchy, (b) because he failed to show that the PIRA considered their efficacy in advancing its objectives; and (c) because he failed to introduce any evidence of his own political motivations. Third, the magistrate adopted the holding of the Seventh Circuit in *Eain v. Wilkes,* and concluded that "[b]y definition, there can be no direct link between [these bombings directed against innocent civilians] and the political goal of the IRA to force British withdrawal from Northern Ireland, as these actions neither took place in Northern Ireland nor were they directed against the government the IRA was attempting to displace."

B. Our Areas of Agreement With the District Court: The "Incidental To" Prong

Like the district court, we believe the magistrate reached a number of erroneous legal conclusions. The incidence test has never required that an accused prove his political motivations directly, or establish that the acts were ordered by the leadership of the uprising group or were effective in obtaining the group's objectives. Nor need an accused prove membership in the uprising group; the magistrate's hairsplitting distinction between Quinn's proven IRA membership and his involvement in a conspiracy with ASU members on the one hand, and his failure to prove conclusively PIRA membership on the other makes apparent the logical absurdity of requiring proof of membership in a specific group.

Quinn is accused of having been a member of a conspiracy involving the Balcombe Street Four and he does

not challenge the probable cause finding on this charge; his fingerprints were found on the bombs and within the flats where bombs were constructed. Quinn has already been convicted of and has served a prison sentence for his membership in the IRA. There is no evidence that he was involved in the conspiracy for other than political reasons, and his alleged co-conspirators, the Balcombe Street Four, were convicted of politically motivated bombings. Moreover the PIRA's use of bombing campaigns as a political tactic is well-documented. Accepting the magistrate's factual findings, which are not clearly erroneous, and applying the legal standards we have explained above, we think it quite clear that if an uprising, as that term is defined for purposes of the political offense exception, existed at the time the offenses were committed, the bombings were incidental to that uprising.

Furthermore, because various disparate acts may be incidental to an uprising, we agree with the district court's conclusion that the Tibble murder would be incidental to the uprising, although we believe the analysis performed by both the magistrate and the district court is in error with respect to this incident. It does not matter if the killer's motivation in killing Officer Tibble was to conceal a bomb factory or to avoid capture. A murder of a police officer is related to an uprising whether the reason for the act is to avoid discovery of munitions or to avoid reduction of "forces" by capture. Regardless which of these goals motivated the killer, if an uprising existed at the time, this offense as well was incidental to it.

C. Our Area of Disagreement With the District Court: The "Uprising" Prong

With regard to the uprising prong of the incidence test, we must again review the magistrate's factual findings under the clearly erroneous standard and his legal conclusions *de novo*. The district court failed to do this, construing the magistrate's conclusion that there was an uprising throughout the United Kingdom solely as a finding of fact. The district court summarized the magistrate's factual findings as to the levels of violence that existed in Northern Ireland and elsewhere in the United Kingdom at the time Quinn allegedly committed the charged offenses, and properly adopted them. However, the district court failed to analyze the magistrate's legal conclusion that because the requisite level of violence existed in Northern Ireland and because Northern Ireland is "in a constitutional sense" a part of the United Kingdom, an uprising existed in the United Kingdom as a whole.

The magistrate traced the history of the constitutional relationship between Ireland and England, the Irish nationalist movement in opposition to British rule in Northern Ireland, and the history of violent political disturbances concomitant with the struggle to liberate Northern Ireland from British rule. During the 1700's, economic and political differences between the Catholics in the south of the one, unified, colonized country of Ireland and the Protestants in the north grew, and in 1800 Ireland's parliament was dissolved and the country became a part of the United Kingdom. Many Catholics continued to demand liberty through the period in the late 1800's when "home rule"—under which Ireland would have remained a part of the United Kingdom but with local control of domestic af-

fairs—was contemplated. In 1914 the British Parliament passed a bill instituting home rule but it was not implemented because of the outbreak of World War I.

After increased violence between Irish rebels—including the IRA—and British forces broke out in 1919, the British Parliament passed the Government of Ireland Act in 1920. That Act divided Ireland into two partially self-governing countries. Most of Ireland's political leaders initially rejected the proposed division, demanding complete independence for all of Ireland. Eventually partition was accepted and in 1921 southern leaders and Great Britain signed a treaty creating the Irish Free State in the south (which became the independent Republic of Ireland in 1949) and Northern Ireland in the north. Under the treaty, Northern Ireland separated from Great Britain. Although it remained a part of the United Kingdom with representation in the British Parliament, it had its own governor, parliament, prime minister, and cabinet and controlled most domestic matters independently. Certain powers, such as levying income taxes and maintaining a militia, were reserved for the British Parliament. The Ulster Unionist Party, the Protestant party, retained control of the parliament in Northern Ireland and Catholics were excluded from political power and subjected to civil discrimination.

IRA-organized violence, with the objective of separating Northern Ireland from the United Kingdom and reuniting the northern and southern parts of Ireland, continued in Northern Ireland. In 1969, the PIRA split off from the IRA, which adopted the view that violence was not the best means to achieve its goals at that time. The PIRA advocated armed insurrection and after one cam-

paign of violence in 1969, British troops were sent into Northern Ireland. PIRA bombing campaigns continued between 1970 and 1972. In 1971, the British passed the Special Powers Act, which provided for internment without trial. In 1972, the British dissolved the Parliament of Northern Ireland and once again established direct rule. PIRA bombings continued through 1973, when the Special Powers Act was replaced by the Emergency Provisions Act. The Emergency Provisions Act abolished jury trials for certain offenses, relaxed standards of admissibility for confessions, and provided special tribunals for the trials of those accused of political crimes.

The PIRA was responsible for a number of bombing campaigns again in 1974 and 1975. These campaigns were designed to "bomb the British government to the bargaining table" and to force the withdrawal of British troops from Northern Ireland. The PIRA took responsibility for the bombings of both military and civilian targets in both Northern Ireland and England. In 1974 the Prevention of Terrorism (Temporary Provisions) Act, which applies to the entire United Kingdom, was passed. The Act extended the length of time police could detain those suspected of political violence; made it illegal to refuse to give to the authorities information about those suspected of committing acts of political violence; suspended habeas corpus rights for detainees; and proscribed the IRA and the Irish National Liberation Army and formal support for them.

The magistrate correctly concluded that there was an uprising in Northern Ireland at the time of the offenses with which Quinn is charged. PIRA members, although a minority faction, sought to change the structure of the gov-

ernment in that country, the country in which they lived. Criminal activity in Northern Ireland connected with this uprising would clearly fall within the political offense exception.

We cannot conclude, however, that the uprising extended to England. We do not question the fact that throughout the time of the alleged conspiracy, some politically motivated violence was taking place in England as well as in Northern Ireland. *See, e.g.,* J. Bell, *The Secret Army: The IRA 1916-1979,* at 403-24 (1980). However, as the magistrate noted, in general the violent attacks and the responses to them were far less pronounced outside of Northern Ireland. It is clear from the record that the magistrate correctly concluded that the level of violence outside Northern Ireland was insufficient in itself to constitute an "uprising."[34]

There is a second and even more significant reason why the "uprising" prong is not met in this case. As the magistrate found, what violence there was was not being generated by citizens or residents of England. In fact, the magistrate determined that a large percentage of the bombing incidents in England were attributable to the Balcombe Street Four. The critical factor is that nationals of Northern Ireland, seeking to alter the government in that territorial entity, exported their struggle for political change across the seas to a separate geographical entity—and conducted that struggle in a country in which the nationals and residents were not attempting to alter their own political structure.

We do not ignore the constitutional, legal, and military relationship between England and Northern Ireland. The

ties are so well established, *see generally* 1 *Europa Year Book 1984,* at 991-96; 14 *World Book Encyclopedia* 403-06b (1985 ed.), that had evidence of the relationship not been presented to the magistrate, judicial notice would have been appropriate. It is beyond dispute that during the time of the conspiracy with which Quinn is charged, Northern Ireland was, in essence under British rule: the British government had dissolved the Northern Ireland Parliament, declared a state of emergency, and made the Secretary of State for Northern Ireland directly answerable for the government of Northern Ireland to the United Kingdom Parliament at Westminster.[35]

We do not question whether the PIRA sought to coerce the appropriate sovereign. Nor do we pass judgment on the use of violence as a form of political coercion or the efficacy of the violent attacks in England. But, as we have already said, *see supra* pp. 62-68, the word "uprising" means exactly that: it refers to a people *rising up,* in their own land, against the government of that land. It does not cover terrorism or other criminal conduct exported to other locations. Nor can the the [sic] existence of an uprising be based on violence committed by persons who do not reside in the country or territory in which the violence occurs.

In light of the justifications for the political offense exception, the formulation of the incidence test as it has traditionally been articulated, and the cases in which the exception has historically been applied, we do not believe it would be proper to stretch the term "uprising" to include acts that took place in England as a part of a struggle by nationals of Northern Ireland to change the form of government in their own land.[36] Accordingly, we need not de-

cide whether had an uprising occured, the protection afforded by the exception would have been extended to one who, like Quinn, is a citizen of a different and uninvolved nation. *See supra* pp. 66-67. Because the incidence test is not met, neither the bombing conspiracy nor the murder of Police Constable Tibble is a non-extraditable offense under the political offense exception to the extradition treaty between the United States and the United Kingdom.

VII. *ISSUES NOT ADDRESSED BY THE DISTRICT COURT*

In addition to contending that all the crimes with which he is charged are protected by the political offense exception, Quinn argued to the district court that the magistrate erred in concluding (1) that the conspiracy charge was not time barred and (2) that there was sufficient competent legal evidence to establish probable cause to believe that he murdered Police Constable Tibble. Because it held that the political offense exception barred extradition, the district court did not reach either of these issues.

A. Appellate Discretion to Resolve These Issues

As a general rule, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff,* 428 U.S. 106, 120 (1976). But this rule is not inflexible. *Youakim v. Miller,* 425 U.S. 231, 234 (1976). We have discretion to decide whether to address an issue that the district court did not reach if the question is a purely legal one and the record has been fully developed prior to appeal; in deciding whether to exercise this discretion we should consider whether the resolution of the issue is clear and whether injustice might otherwise result. *See Lien Ho Hsing Steel Enterprise Co. v. Weihtag,* 738 F.2d 1455, 1461

(9th Cir. 1984); *In re Howell*, 731 F.2d 624, 627 (9th Cir. 1984).

The government suggests in a footnote in its appellate brief that we should exercise our "pendent" jurisdiction and resolve the issues not addressed by the district court, yet it failed to brief those issues on appeal. Quinn argues on appeal that the two remaining issues are not properly before us; he also did not brief either of these issues on appeal. We do have before us the parties' memoranda to the district court and the full factual record developed before the magistrate and, at this point, the questions appear to be purely legal. Accordingly, we evaluate the remaining factors to determine whether to reach these issues.

Clearly, in considering the risk that injustice might result, we must be more concerned about the possible unjust deprivation of Quinn's liberty than about any other source of injustice. The delay that could result from a remand on these issues affects both parties; we cannot see any other manner in which a remand might cause injustice to the government. However, because Quinn has asked us not to reach these issues, the fact that a remand might prolong his pre-trial detention is insufficient, in itself, to convince us that we should resolve issues that have not been addressed on appeal.

The crucial factor, then, appears to be whether the resolution of either of these issues is clear. We believe that the probable cause issue is clear and we thus resolve it. The statute-of-limitations issue, in contrast, is quite complex and involves a discovery request as well. Accordingly, we do not reach that issue at this time.

B. Probable Cause: The Tibble Murder

Although he accepts the magistrate's conclusion that there is probable cause to believe that Police Constable Tibble was murdered, Quinn contends that the magistrate erred in concluding that there was any competent evidence to support the belief that he was the murderer. Quinn points to alleged procedural irregularities in the circumstances surrounding Constable Blackledge's identification, the "double hearsay" method of presenting this evidence through Inspector Watts, *see supra* pp. 11-12, the six year delay between Blackledge's identification in Ireland and Watts' photo identification after Quinn's arrest in San Francisco, and some contradictions between the description of the assailant Blackledge originally gave the police and Quinn's actual physical characteristics, *see supra* p. 10. Quinn contends that because of these irregularities the evidence is unreliable and cannot be considered "competent," *see supra* pp. 25-27, and that it thus cannot support the probable cause finding. We disagree.

Clearly the evidence introduced before the magistrate for the purpose of linking Quinn with the Tibble murder is not overwhelming. If that were all the evidence introduced at a murder trial, Quinn could not be convicted. But the country seeking extradition is not required to produce all its evidence at an extradition hearing and it is not our role to determine whether there is sufficient evidence to convict the accused. The magistrate does not weigh conflicting evidence and make factual determinations but, rather, determines only whether there is competent evidence to support the belief that the accused has committed the charged offense. *See supra* p. 27. And on review we can determine only whether, because of an absence of competent evidence,

the magistrate's determination is wrong as a matter of law. *Cf. Ker v. California*, 374 U.S. 23, 33-34 (1963) (reasonableness of search and seizure is mixed question of law and fact which is reviewed *de novo); United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.) (en banc) (probable cause determination is mixed question of law and fact which is reviewed *de novo), cert. denied*, 105 S. Ct. 101 (1984).

The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate. *See Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971). The magistrate was free to determine the weight to be accorded to the various descriptions of the killer. In addition, although the magistrate may take the circumstances of an identification into account in assessing its reliability, there is no *per se* rule that specifies which identification procedures are "competent" for probable cause purposes. An identification does not fail to constitute competent evidence merely because the required United States procedures for admissibility of the identification at trial were not followed. *See Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984) (multiple hearsay method of presenting evidence may decrease reliability of evidence but evidence may nevertheless be sufficiently reliable to be "competent"); *Escobedo v. United States*, 623 F.2d 1098, 1102 & n. 10 (5th Cir.) (single photograph identified by witness sufficient to support probable cause finding), *cert. denied*, 449 U.S. 1036 (1980). Barring hearsay from extradition proceedings would thwart one of the objectives of bilateral extradition treaties by requiring the requesting nation to send its citizens to the extraditing country to confront the accused. *Zanazanian*, 729 F.2d at 626-27.

Because the magistrate properly determined that there is competent legal evidence to support the belief that Quinn murdered Officer Tibble, the habeas petition cannot be granted for lack of probable cause. *See Fernandez v. Phillips,* 268 U.S. 311, 312 (1925); *Valencia v. Limbs,* 655 F.2d 195, 197 (9th Cir. 1981).

C. The Statute of Limitations on the Conspiracy Charge

In addition to the political offense exception, the extradition treaty between the United States and the United Kingdom provides that "[e]xtradition shall not be granted if . . . the prosecution for the offense for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested Party . . . ." *Treaty, supra* p. 1, at art. V(1)(b). Neither the United States nor the United Kingdom imposes a statute of limitations on murder charges. Since the United Kingdom has no relevant limitations period, the applicable statute of limitations on the conspiracy charge is that which is set forth in 18 U.S.C. § 3282 (1982).

Under section 3282, prosecution on a conspiracy charge is barred "unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." The United Kingdom does not follow the same criminal procedures as the United States; no indictment is issued for a conspiracy charge, and the extradition magistrate determined that the United Kingdom's "laying of an information" is not analogous to the United States procedures mandated by section 3282.

Quinn contends that the conspiracy charge is time-barred because the conspiracy terminated on April 3, 1975, and the United Kingdom's extradition request was not filed

until November 1981, well over five years later. However, the magistrate concluded that the statute of limitations was tolled when Quinn became a fugitive from justice after the murder of Officer Tibble,[37] and that the tolling continued through the time of Quinn's Daly City arrest, notwithstanding the British government's fairly consistent knowledge of his whereabouts from the time that Blackledge identified him in 1975 through the time he was incarcerated in Ireland and the years that he subsequently lived openly and notoriously in San Francisco.[38] The government, which originally specified that it would not contend that Quinn was a fugitive at any time and which addressed the issue only after the magistrate *sua sponte* ordered the parties to do so, asks that the magistrate's findings on the fugitive issue be affirmed. In the alternative, it contends that the habeas court should affirm the magistrate's conclusion that the extradition request is timely by concluding that the United Kingdom's "laying of an information" satisfies the United States' statute of limitations.[39]

Each of these questions is complex. Complicating them further, Quinn contends that the magistrate erred as a matter of law in refusing his request for discovery on the fugitive issue. He seeks documents that would demonstrate that the United Kingdom knew his whereabouts and was dilatory in initiating proceedings. He also contends that, because the standard of proof for the fugitive issue is a preponderance standard,[40] he is entitled to discovery in order to test the credibility of the Blackledge identification that serves as the premise for the theory that his absence from the United Kingdom was due to a desire to avoid arrest or prosecution.[41]

The multiple legal questions involved in the statute of limitations issue are complicated; their resolution is not clear and could even lead to the introduction of additional facts. Accordingly, it would not be proper for us at this time to decide this issue which the district court did not reach and the parties have not briefed on appeal. Nor would it be appropriate to indicate any view as to its ultimate outcome. Should the United Kingdom continue to be interested in pursuing Quinn's extradition on the conspiracy charge so that he may be tried for that offense, it will have to await the district court's determination whether the charge is time-barred, and possibly our subsequent review.[42]

VIII. *CONCLUSION*

For extradition to be denied for an otherwise extraditable crime on the basis that it falls within the protective ambit of the political offense exception, the incidence test must ordinarily be met. (We reserve the question whether offenses committed by government officials or in connection with wars between nations are covered by the exception and, if so, whether a different test would be appropriate.) The incidence test has two components, designed so that the exception comports with its original justifications and protects acts of the kind that inspired its inclusion in extradition treaties. First, there must be an uprising—a political disturbance related to the struggle of individuals to alter or abolish the existing government in their country. An uprising is both temporally and spatially limited. Second, the charged offense must have been committed in furtherance of the uprising; it must be related to the political struggle or be consequent to the uprising activity. Neither the objectives of the uprising nor the means employed to achieve

those objectives are subject to judicial scrutiny. And while the nature of the uprising group and any evidence of the accused's motivations may be relevant, proof on these elements is not required or necessarily determinative. Acts of international terrorism do not meet the incidence test and are thus not covered by the political offense exception. Crimes against humanity also are beyond the scope of the exception.

The conspiracy to cause explosions and the murder with which Quinn is charged do not fall within the political offense exception. Although an uprising existed in Northern Ireland at the time the charged offenses were committed, there was no uprising in England. The crimes did not take place within a territorial entity in which a group of nationals were seeking to change the form of the government under which they live; rather the offenses took place in a different geographical location. We do not decide whether Quinn's status as a citizen of an uninvolved nation would also preclude him from receiving the protection of the exception.

We conclude that the magistrate did not err in finding probable cause in connection with the charge that Quinn murdered Officer Tibble. However, we cannot properly determine at this point whether the conspiracy charge is time-barred. That matter must first be considered by the district court.

We vacate the writ of habeas corpus and remand to the district court. We hold that Quinn may be extradited on the murder charge but that the district court must consider whether the conspiracy charge is time-barred before extradition is permitted for that offense.

VACATED AND REMANDED

FOOTNOTES

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1. *See In re Mackin*, 668 F.2d 122 (2d Cir. 1981) (determining that magistrate had jurisdiction to decide the applicability of the political offense exception, but declining to review the merits of the magistrate's decision on appeal or writ of mandamus) *Escobedo v. United States*, 623 F.2d 1098 (5th Cir.) (determining in one paragraph that charges arising out of the kidnapping of Cuban Consul in Mexico in 1976 were not within political offense exception because of absence of any violent political disturbance to which they could have been incidental), *cert. denied*, 449 U.S. 1036 (1980); *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (determining that charge of fraudulent bankruptcy was not within political offense exception because of absence of any political disturbance to which the act could have been incidental; that there was no evidence that the requesting nation sought accused's extradition on fraudulent bankruptcy charge in order to try him covertly for a political offense; and that degree of risk to accused's life from extradition was an issue that properly fell within purview of executive branch); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971) (determining that charge of embezzlement by public official was not within political offense exception because of absence of political disturbance to which the offense could have been incidental), *cert. denied*, 405 U.S. 989 (1972); *Jimenez v. Aristequieta*, 311 F.2d 547, 558-60 (5th Cir. 1962) (determining that potentially political character of alleged murders did not bar extradition on separate charges of fraud and embezzlement when those acts were not incidental to a violent political disturbance).

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* I have been authorized to include this footnote on behalf of the full panel.

We are unanimous in our decision that the writ of habeas corpus issued by the district court must be vacated. We reach this difficult decision by somewhat different routes.

Judge Duniway concurs in the result but not for the reasons that are set forth in this opinion. His reasons appear in his separate concurring opinion.

Judge Fletcher concurs in the reasoning set forth in this opinion with the exception of the part that treats England and Northern Ireland as separate entities for purposes of applying the "uprising" component of the political offense doctrine. Her disagreement on that point causes her to dissent from the hold-

ing that Quinn may be extradicted on the murder charge. As her concurring and dissenting opinion states, she would remand in order to permit the district court to determine the extent of Quinn's ties to Northern Ireland. I do not find it necessary to reach that issue, *see* page 68 *infra*, but believe that Judge Fletcher's argument regarding the necessity for such ties has considerable merit.

We are unanimous in our holding that a remand to the district court is required with respect to the conspiracy charge. We also are unanimous that extradition on that count would not be proper in the absence of an appropriate resolution of the statute of limitations issue, a decision that must be made initially by the district court.

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2. Quinn was originally charged with one count of murder of a police constable, three counts of sending letter bombs in the London area, two counts of causing explosions in the London area, one count of placing an explosive device in the London area, and one count of conspiracy with six other persons to cause explosions in the United Kingdom. The request for extradition on all but the murder and conspiracy charges was withdrawn by the United Kingdom prior to the hearing before the magistrate.

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3. Quinn followed the proper procedure for seeking review of the magistrate's extradition order. Because of the limited function of an extradition proceeding, *see Charlton v. Kelly*, 229 U.S. 447, 461 (1913) (analogizing extradition hearing to a preliminary hearing in a criminal case), there is no appeal from an extradition order by the government or by the defendant, *Collins v. Miller*, 252 U.S. 364, 369-70 (1920); *In re Mackin*, 668 F.2d 122, 125-27 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.) *cert. denied*, 454 U.S. 894 (1981); *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978). *But cf.* Proposed Extradition Act of 1984, H.R. 3347, 98th Cong., 2d Sess. § 3195(a)(1) (making extradition decision appealable), *printed in* H. Rep. 998, 98th Cong., 2d Sess. 54 (1984). However, res judicata does not apply, *Hooker*, 573 F.2d at 1368, and the government is free to reinstitute an extradition request after it has been denied in a first extradition proceeding, *Mackin*, 668 F.2d at 128; *Hooker*, 573 F.2d at 1368. A petition for a writ of habeas corpus is the only mechanism by which the defendant can seek review. *Mackin*, 668 F.2d at 128; *Eain*, 641 F.2d at 508; *Hooker*, 573 F.2d at 1364. *See generally* Lubert & Czackes, *supra* p. 3 at 199.

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4. Quinn raised the same arguments before the district court that he had presented to the magistrate, *see supra* p. 12, except that he no longer contended that there was insufficient evidence to find probable cause to believe he had engaged in a conspiracy to cause explosions.

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5. Quinn remains in custody because we granted the United Kingdom's motion for a stay of release pending appeal.

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6. Clearly, if application of the exception required us to approve of the political goals of an uprising group, executive discretion in granting protection from extradition would be more appropriate than judicial review. *See, e.g.*, Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 Va. J. Int'l L. 163, 182 (1980).

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7. We note that since this case was argued, Congress has enacted the 1984 Act to Combat International Terrorism, Pub. L. 98-533, 98 Stat. 2706 (to be codified in scattered sections of 18 U.S.C., 22 U.S.C., & 41 U.S.C.). Section 201(a) of that Act, 98 Stat. 2709, urges the President "to seek more effective international cooperation in combating international terrorism, including . . . extradition of all terrorists." This mandate supports some of the substantive conclusions we reach below. *See infra* pp. 64-65. However, it does not assign to the executive initial responsibility for determining when the exception applies or suggest that the relationship between the United States and the requesting nation should be considered when a judicial determination is made regarding whether the exception applies.

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8. Whether the political offense exception applies in a particular case requires an inquiry not unrelated to and somewhat less intrusive than that required to determine if the Attorney General is prohibited from deporting or returning an alien to a country if "such alien's life or freedom would be threatened in such country on account of . . . political opinion," 8 U.S.C. § 1253(h) (1982). *See Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (9th Cir. 1984) (evaluating whether threatened persecution is based on political opinion). We note that, rather than considering such a determination as one properly left to the executive branch, Congress has recently amended

this section of the Immigration and Nationality Act to *remove* the Attorney General's discretion in making the determination that an alien is likely to be persecuted on the basis of political opinion. *See INS v. Stevic*, 104 S. Ct. 2489, 2496 n.15 (1984) (discussing effect of section 203(e) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which amended 8 U.S.C. § 1253(h)).

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9. In *Ornelas v. Ruiz*, 161 U.S. 502 (1896), in reviewing a determination that a raid on a Mexican town was not protested by the political offense exception, the Court considered whether the extradition court "had no choice on the evidence" but to conclude that the acts were politically motivated. *Id.* at 511. Although this standard of review is substantially the same as the clearly erroneous standard's requirement that the reviewing court have "the definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.*, 333 U.S. 364, 365 (1948), earlier in its opinion the Court noted that the magistrate's judgment that the charged offense is an extraditable crime should be reversed if "palpably erroneous in law," *id.* at 509, suggesting a *de novo* review of the legal aspects of the magistrate's mixed fact and law determination. We note that since *Ornelas* was decided in 1896, the Supreme Court has held that various mixed question of law and fact are received *de novo, see, e.g., Ker v. California*, 374 U.S. 23, 33-34 (1963) (reasonableness of searches and seizures), a standard of review we adopted for all mixed questions of fact and law in *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984).

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10. Under current practice extradition hearings are generally conducted by magistrates. However, 18 U.S.C. § 3184 grants jurisdiction to conduct extradition hearing to "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State."

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11. The differing justifications partially explain the differences between the test we apply in determining whether the political offense exception applies and the analysis we make when determining whether an alien is entitled to relief from deportation because of a threat of political persecution. *See supra* note 8 & *infra* note 15. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.

(1982)), responded to a "national commitment to human rights and humanitarian concerns." S. Rep. No. 256, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Ad. News 141, 141. The political offense exception, in contrast, is justified by an acceptance of the right to political self-determination as well as by humanitarian concerns.

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12. French courts have more recently begun to follow a less rigid approach, first set forth in *In re Rodriquez*, 2 Gaz. Palais 113 (Ct. App. Paris, Fr. 1953). The new French test is similar to the Swiss test in considering the context in which the crime was committed and the motivations of the accused, *see* Carbonneau, *supra* p. 34, at 19-22, but French courts have not incorporated a rigid ends-means test, *id.* at 30.

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13. The Swiss, aware that their test incorporates factors that preclude ideological neutrality, allow only their highest court to determine when the political offense exception applies. *See Politics of Extradition, supra* p. 31, at 631 (citing 1 L. Oppenheim, *International Law* 579 (4th ed. 1928).

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14. A number of commentators have suggested that perhaps the most useful test for when the exception should apply can be derived from the theory of "ideological self-preservation." *See, e.g.*, M. Bassiouni, *International Extradition: United States Law & Practice* ch. VIII, at § 2-74 to § 2-77 (1983); C. Van den Wijngaert, *supra* p. 22, at 157-58. The premise of this theory is that a political crime is justified if it is a form of self-defense, in that the means used to attempt to secure a fundamental right were limited to the least harmful means available. The commentators suggest that an objective test could be derived from this theory and would weigh (a) the nature of the rights violated by the state; (b) the nature of the state conduct that violated these rights; and (c) the nature of the individual conduct that violated the law of the state in an attempt to defend these rights. As one commentator has noted, *see* C. Van den Wijngaert, *supra* p. 22, at 158, this test resembles the Swiss proportionality test but, in addition to the balancing required by that test, it requires an evaluation of the conduct of the requesting nation. Despite the initial appeal of the theory of ideological self-preservation, we believe it is an inappropriate test. It is subject to all the criticisms to which the Swiss test is subject. Moreover, it requires the kind of evaluation of the conduct of another nation that violates the principle of non-

intervention in the internal affairs of another state. *See id.* It thus runs counter to one of the primary tenets underlying the political offense exception, *see supra* pp. 31-32, and requires the judiciary to undertake a task for which it is particularly ill-suited, *see supra* pp. 20-21 & note 6.

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15. The British refusal to extradite those who are at risk of persecution parallels the United States' standards for asylum, *see* 8 U.S.C. § 1158(a) (1982), and for prohibiting the Attorney General from returning an alien to a country in which the alien's life or freedom would be threatened, *see* 8 U.S.C. § 1253(h) (1982). However, in contrast to the British standard, United States courts hesitate to evaluate either the accused's motives when applying the political-offense incidence test, *see infra* pp. 42, 69, or the alien's subjective fears when determining whether the Attorney General is prohibited from returning an alien to a specified country, *see Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (1984). *But see id.* at 1321 n.11 (courts consider subjective fear in determining whether alien qualifies for grant of asylum). In the United States in the extradition context the Secretary of State evaluates the risks that an accused will be persecuted if extradicted. *See supra* pp. 23-24.

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16. The court referred that issue to the executive branch. 62 F. at 986; *see supra* pp. 23-24.

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17. Although unnecessary to the resolution of the cases before them, a number of courts have stated that a "war" could qualify as the violent political disturbance for purposes of the incidence test. *See, e.g., Eain v. Wilkes*, 641 F.2d 504, 518 (7th Cir.), *cert. denied*, 451 U.S. 894 (1981); *Sindona v. Grant*, 619 F.2d 167, 173 (2d Cir. 1980). Although the terms "rebellion," "revolution," "uprising," and "civil war" may for our purposes be treated as synonymous, none is for any purpose synonymous with the term "war." As we discuss further below, *see infra* note 33, we question the propriety of applying the incidence test in the same manner in the case of crimes occurring during wars as in the case of crimes occuring during uprisings.

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18. American courts generally will take judicial notice of a state of uprising. *See, e.g., Karadzole v. Artukovic*, 247 F.2d 198, 204 (9th Cir. 1957) (noting that district court properly took judicial notice of struggle for political control in Croatia), va-

cated and remanded, 355 U.S. 393 (1958) (mem.); *Ramos v. Diaz,* 179 F. Supp. 459, 462 (S.D. Fla. 1959) (extradition court took judicial notice of revolutionary movement in Cuba); *In re McMullen,* No. 3-78-1099 MG, slip op. at 4 (N.D. Cal. May 11, 1979) (magistrate took judicial notice of uprising in Northern Ireland). *But see In re Abu Eain,* No. 79- M 175, slip op. at 13-14 (N.D. Ill. Dec. 18, 1979) (magistrate refused to take judicial notice of Middle East hostilities), *reprinted in Abu Eain v. Adams,* 529 F. Supp. 685, 688-95 (N.D. Ill. 1980).

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19. The extradition question in this case originally went up and down the federal court system for almost a decade. *See Artukovic v. Boyle,* 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub nom. Ivancevic v. Artukovic,* 211 F.2d 565 (9th Cir.), *cert. denied,* 348 U.S. 818, *reh. denied,* 348 U.S. 889 (1954), *on remand,* 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom. Karadzole v. Artukovic,* 247 F.2d 198 (9th Cir. 1957), *vacated and remanded,* 355 U.S. 393 (1958) (mem.), *surrender denied on remand sub nom. United States v. Artukovic,* 170 F. Supp. 383 (S.D. Cal. 1959). After Congress removed protection from alleged Nazi war criminals who claimed to be at risk of persecution if deported, *see* Immigration and Nationality Act—Nazi Germany, Pub. L. No. 95-549, 92 Stat. 2065 (codified at 8 U.S.C. §§ 1251, 1253-54 (1982)), deportation proceedings that had been initiated in 1951 on the basis of Artukovic's 1948 illegal entry into the United States were reinstated. *See Artukovic v. INS,* 693 F.2d 894, 896 (9th Cir. 1982). We held that the stay of Artukovic's deportation, granted in 1959 on the ground that Artukovic would be subject to persecution if deported to Yugoslavia, *see id.* at 896, could not be revoked without a hearing, *see id.* at 899. Then, in 1984, Yugoslavia filed a new extradition request; a magistrate determined that there was probable cause to believe Artukovic committed the charged offenses. *See Extradition of Artukovic,* CV 84-8743-R(B) (C.D. Cal. May 1, 1985). The district judge denied the habeas petition, *see Artukovic v. United States,* No. CV 85-3611-R (C.D. Cal. February 6, 1986), and Artukovic was extradicted a few days later.

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20. Because the Supreme Court vacated the judgment in *Artukovic* without discussion of the merits, *see* 355 U.S. 393 (1958), we cannot reach any conclusion about whether it believed Artukovic's acts were protected by the political offense exception. However, it is clear that our opinion has no precedential value. *See County of Los Angeles v. Davis,* 440 U.S. 625,

634 n. 6 (1979) ("Of necessity our decision 'vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . .'") (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 577-78 n. 12 (1975)).

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21. *See* M. Bassiouni, *supra* note 14, at ch. VIII, §§ 2-80, 2-83 (1983); C. Van den Wijngaert, *supra* p. 22, at 44, 140-41; Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 Mich. L. Rev. 832, 939 (1964) (citing Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277); *see also* I. A. Shearer, *supra* p. 22, at 186 (Genocide Convention imposes extradition obligation on parties thereto).

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22. *See* Bassiouni, *International Law and the Holocaust*, 9 Cal. W. Int'l L.J. 201, 255-56 (1971) ("Crimes against humanity" including genocide "involve wholesale human depredation which could not occur without the state's instigation' or acquiescence."); Garcia-Mora, *supra* note 21, at 933-34 (quoting Draft Code of Offenses Against the Peace and Security of Mankind art. 2, para. 11, Report of the International Law Commission to the General Assembly, 9 U.N. GAOR Supp. (No. 9) at 9-11, U.N. Doc. No. A/2693 (1954)); *cf. The Nurnberg (Nuremberg) Trial*, 6 F.R.D. 69, 108 (Int'l Military Tribunal 1946) (holding that international tribunal had jurisdiction to hold individual defendants responsible for aggressions, crimes against humanity, and war crimes because these individuals, who occupied responsible positions in the German government, must have known that their acts violated Germany's responsibilities under international law); M. Bassiouni, *International Criminal Law: A Draft International Criminal Code* 65 (1980) (pointing out that various war crimes necessarily involve a policy level government decision).

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23. War crimes include "devastation not justified by military necessity." *See The Nurnberg (Nuremberg) Trial*, 6. F.R.D. at 130.

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24. The incidence test was originally intended to afford protection to individuals engaged in political resistance; the test was designed to identify a set of protestors, namely, those engaged in an uprising designed to change the existing govern-

ment. *See supra* pp. 31-32. It is unclear whether this test applies to former government officials, *cf. In re Ezeta*, 62 F. 972, 1000 (N.D. Cal. 1894) (noting that most extradition cases involve acts committed against the government, and that such cases are only of *some* value when the pending case concerns acts that were committed by representatives of the then-existing government), and even whether the political offense exception is applicable at all to such individuals.

Courts have heretofore, on the few occasions when conduct by former governmental officials was involved, *see, e.g., Jimenez v. Aristequieta*, 311 F.2d 547 (5th Cir. 1962); *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894), simply assumed without discussion or analysis that the political offense exception was applicable and that the incidence test constituted the proper standard. That is what we did in *Artukovic*. Because all acts of government officials that carry out a government policy are, by definition, political, applying the incidence test makes little sense and leads to paradoxical results. It gives special protection to officials when they are suppressing an uprising and strips them of protection at all other times. Conceptually, the appropriate analogy to individuals acting in furtherance of an uprising is government officials acting in furtherance of a government policy, not in connection with an uprising. Thus, a serious question exists as to whether we should apply the incidence test where extradition is requested of persons who commit crimes while officials of a government.

Since the political offense exception is rooted in a desire to protect those rebelling against autocratic regimes, there is, as we have suggested, some question whether the doctrine is applicable at all in the case of former government officials. There are, however, two policies in addition to the protection of those who engage in political uprisings that underlie the political offense exception. They are concern [sic] about the safety and welfare of those who have engaged in political activity that is offensive to the government now in power and a commitment to non-intervention in the internal affairs of foreign countries. Both these policies would be applicable in the case of former government officials who have fled their native land. Thus, it can be argued that while the incidence test may be inappropriate for evaluating the extraditability of former government officials, the exception itself is applicable and a different test should be devised for use in such cases. *See also infra* note 33 (discussing application of the incidence test to wars between nations). However, we leave these questions for resolution in future cases.

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25. The United States government subsequently sought to deport McMullen because of his illegal entry into this country and his undocumented status. We found that McMullen had established that, because he had deserted the PIRA, his life or freedom would be threatened if he returned to the United Kingdom. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

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26. The magistrate in *Mackin* also evaluated whether Mackin was a member of a group engaged in an uprising. We do not find any support in the case law for imposing this requirement. *See* discussion *infra* pp. 69-70.

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27. In contrast to the *McMullen* magistrate, the *Mackin* magistrate suggested that sufficiently "anarchistic" acts, such as those directed at civilians, would be extraditable. However, the fact that a group that engaged in dispersed political violence frequently directed at civilians carried out the bombing was, in the magistrate's view, insufficient to remove the acts from the exception's protection.

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28. The Seventh Circuit did not characterize the PLO's efforts to expel Jews from Israel as a part of a plan to commit a "crime against humanity." We express no view here as to whether the PLO's actions might constitute such a crime. See *supra* p. 47 for a discussion of the meaning of the term "crimes against humanity." Our comments are limited to the form of analysis actually employed by the *Eain* court.

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29. The distinction between "innocent" and "guilty" civilians may not be as simple as it may first appear and is not always an ideologically neutral distinction. C. Van den Wijngaert, *supra* p. 22, at 156 & n. 839. Similarly, we question how a court is to define "indiscriminate," as opposed to "defensible," bombings of civilians. Any such effort would probably directly involve the court in the types of political judgments that the American version of the political offense exception has always sought to avoid.

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30. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 105

S. Ct. 1354 (1985); 1984 Act to Combat International Terrorism, Pub. L. 98-533, 98 Stat. 2706 (to be codified in scattered sections of 18 U.S.C., 22 U.S.C., & 41 U.S.C.); *cf.* European Convention on the Suppression of Terrorism art. 1, *done* Jan. 27, 1977, *reprinted in Control of Terrorism: International Documents* 87 (Y. Alexander ed. 1979) (Council of Europe declares terrorist acts excluded from political offense exception to treaties between members of that Council); Protocol I to the Geneva Conventions art. 51, *adopted* June 8, 1977, U.N. Doc. A/32/144 annex I, *reprinted in* 16 Am. Society Int'l L., *Int'l L. Materials* 1391, 1431-32 (1977) (condemning violence designed to spread terror among civilian populations).

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31. *See, e.g.*, G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30) at 142, U.N. Doc. A/9030 (1974) (armed struggles for independence and self determination are "in full accordance with the principles of international law").

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32. In cases where it appears that a fair trial is unlikely, the Secretary of State retains discretion to refuse extradition even if a court determines that the incidence test is not met. *See supra* pp. 23-24.

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33. A number of courts have suggested that the incidence test is applicable whether it occurs during a violent political disturbance such as an uprising, rebellion, or *war*. *See supra* note 17. If, by using the term "war" these courts meant a civil war, *see, e.g., In re Ezeta*, 62 F. 972 (N.D. Cal. 1894), we have no difficulty with their characterization of the test; we see no difference between an uprising, a rebellion, a revolution, and a civil war. In contrast, if these courts used the term to refer to violent conflicts between nations that transcend national boundaries, we question whether the protections afforded by the exception should be available and, if so, whether the incidence test should apply.

First, we note that wars between nations are the manifestation of hostilities between two or more governments and that those who participate in these wars typically are representatives of one of the involved governments. Thus, the questions regarding the political offense exception's applicability to government officials arise. *See supra* note 24. Second, we note that one of the primary purposes of the exception is to protect revolutionary activity. *See supra* pp. 31-32. Although the two other

justifications for the exception, *see id.*, suggest that perhaps offenses incidental to wars should receive some protection, the absence of the primary justification cautions against applying the same test to transnational military conflicts as is applied to uprisings. Third, the application of the incidence test to international conflicts is inconsistent with the traditional formulation of the test and the jurisprudence in this area. With the exception of the *Artukovic* case, *see* discussion *supra* pp. 44-48 & notes 19-24, (in which the offenses were not, in any event, necessarily incidental to World War II) courts do not appear to have applied the incidence test to offenses engaged in during the course of military conflicts between nations. Rather, they have followed the *Castioni* formulation that the offense must be related to "a political rising," 1 Q.B. at 165 (per Hawkins, J.), or the *Ezeta* formulation that it must be related to a "civil war, insurrection, or political commotion," 62 F. at 998.

As in the case of other acts by government representatives, we need not decide whether acts committed in the course of hostilities between nations should be protected by the exception. We need only note that if they are we question the applicability of the incidence test in such circumstances.

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34. In his discussion, the magistrate considered separately the level of violence in Great Britain and in Northern Ireland. It is not clear whether in referring to Great Britain he meant England or England, Scotland, and Wales. In any event, his conclusion that the requisite level of violence existed only in Northern Ireland was correct.

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35. The Secretary of State did not gain parliamentary consent to establish a new parliament until 1982. *See 1 Europa Year Book 1984, supra* p. 81, at 991-92, 996.

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36. In one other case, *In re McMullen*, No. 3-78-1099 MG (N.D. Cal. May 11, 1979), the extradition magistrate also concluded that, because the PIRA violence was not confined to Northern Ireland, the uprising extended throughout the entire United Kingdom. For the same reasons that we find that there was no uprising in England or Great Britain at the time of the acts with which Quinn is charged, we believe the uprising determination in McMullen was in error. We note, however, that the United Kingdom never filed a new extradition request in McMullen's case and that McMullen has since been granted asylum. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

37. The magistrate determined that an individual who flees from the scene of the crime is, by definition, a fugitive. We do not believe the issue is quite that simple. *See United States v. Parrino*, 180 F.2d 613, 616 (2d Cir. 1950) (Learned Hand, C.J.).

38. The magistrate determined that Quinn must have known that he was wanted by the authorities in question, a requirement for being determined to be a fugitive, *see United States v. Gonsalves*, 675 F.2d 1050, 1053 (9th Cir. 1982). In contrast, in its memorandum in opposition to the writ, the government does not argue that there is sufficient evidence to demonstrate that Quinn acted from 1975 until 1981 with the intent of avoiding arrest or prosecution for this offense, as required by *United States v. Wazney*, 529 F.2d 1287 (9th Cir. 1976), and its progeny. Rather, the government suggests that the Ninth Circuit's intent rule be abandoned in favor of a "mere absence from the jurisdiction" rule, a suggestion we have previously rejected in an extradition case, *see Caplan v. Vokes*, 649 F.2d 1336, 1341 (9th Cir. 1981).

39. Quinn argues that the limited scope of habeas review of an extradition order precludes a reversal of the magistrate's finding on this point. In order to determine the appropriate standard of review, the district court must decide on remand what portion of the magistrate's determination of this issue was based on factual findings and what portion was based on legal conclusions.

40. *See Jhirad v. Ferrandina*, 536 F.2d 478, 485 (2d Cir. 1976).

41. Although there is no explicit statutory basis for ordering discovery in extradition hearings, *see Merino v. United States Marshal*, 326 F.2d 5, 12-13 (9th Cir. 1963), the extradition magistrate has the right, under the court's "inherent power," *see First National City Bank of New York v. Aristequieta*, 287 F.2d 219, 226 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963), to order such discovery procedures "as law and justice require," *Jhirad v. Ferrandina*, 536 F.2d at 484. In exercising discretion, the magistrate should consider both "the well-estab-

lished rule that extradition proceedings are not to be converted into a dress rehearsal trial," *id.*, and whether the resolution of the contested issue would be appreciably advanced by the requested discovery, *id.* Although the accused is not entitled to introduce evidence that goes to his defense, "he may offer limited evidence to explain elements in the case against him". *Jimenez v. Aristequieta*, 311 F.2d 547, 556 (5th Cir. 1962). Needless to say, a habeas court can determine whether the magistrate's decision to deny discovery constituted an abuse of discretion that deprived the accused of due process. *See id.; Jhirad*, 536 F.2d at 484.

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42. In the alternative, the United Kingdom is free to withdraw its request for extradition on the conspiracy charge, in which case Quinn could be extradited to and tried in the United Kingdom on the murder charge. *See supra* p. 6.

QUINN v. ROBINSON — No. 83-2455

(Filed February 18, 1986)

DUNIWAY, Circuit Judge (Concurring in the Judgment):

I concur in the judgment, but I cannot concur in the lengthy opinion of Judge Reinhardt and the very extensive dicta that it expounds.

I agree that the magistrate had jurisdiction, including jurisdiction to determine whether the offenses with which Quinn is charged were of a political character. I agree that the district court had jurisdiction on habeas corpus to decide that question and that we have jurisdiction on appeal to consider it. I have no doubt that the evidence is sufficient to enable, indeed, to require, the magistrate, the district court, and this court to say that the offenses charged against Quinn are extraditable offenses, and that the only basis upon which extradition could be denied is the treaty provision that "extradition shall not be granted if . . . the offense . . . is regarded by the requested party, [the United States], as one of a political character."

My principal difficulty is with part V of Judge Reinhardt's thoughtful and careful opinion, and especially with part V, B, 2, and the geographical limitation announced there, reading as follows:

> Equally important, the uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term "uprising" refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occure only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising.

The limitation may be useful to us in this case, but I doubt that it is a valid one. To consider an old example, let us suppose that the treaty was in effect immediately following the revolutionary war, and his majesty's government sought to extradite John Paul Jones for piracy in British waters. Would we grant extradition because there was no uprising in Great Britain? Assume that we had a comparable treaty with the government of Nicaragua. Suppose that, today, a citizen of Nicaragua, active in the so-called contras, were to sink a vessel owned by the Sandinista government on the high seas, and flee to this country. Would we grant extradition because his act did not take place within the territorial waters of Nicaragua?

Particularly today, with the airplane, the helicopter, the high speed motor vehicle, the railroad, the speedboat and submarine, genuinely revolutionary activities can take place outside the geographic boundaries of the requesting state. I fear that if we adopt the geographic limitation propounded in the opinion today, we will find ourselves trying to work our way around it tomorrow.

I much prefer the rationale of the Seventh Circuit in *Eain v. Wilkes*, 7 Cir., 1981, 641 F.2d 504. There, the court held that the political character of the offense provision does not apply to "the indiscriminate bombing of the civilian population" (p. 521). I cannot believe that the framers of the treaty intended that the exception would embrace the kind of activities that the record in this case reveals. As the *Eain* court said, "We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere." (p. 520)

This case does not involve the "random bombing" that *Eain* involved. But every letter bomb to which Quinn was connected was directed to an innocent, albeit influential, civilian who had no direct connection to the troubles in Northern Ireland. Nor does the fact that Tribble was a policeman make any difference. The evidence does not indicate that Quinn knew or believed that he was a policeman. Moreover, it would make no difference if he did either know it or believe it. The killing of Tribble was an attempt to avoid arrest for extraditable offenses. The fact that Tribble was a policeman cannot metamorphose that killing, which, on its face, was a murder to escape arrest, into an offense regarded by the United States as one of a political character.

I concur in part VII C of the opinion, and in the judgment.

QUINN v. ROBINSON, No. 83-2455

FLETCHER, Circuit Judge, Concurring and Dissenting:

(Filed February 18, 1986)

I respectfully dissent from my colleagues' conclusion that Quinn may now be extradited on the murder charge. The decision facing this court is excruciatingly difficult. Quinn is accused of hideous crimes—violent and cruel and some of them cowardly. Innocent victims were targeted for receipt of letter bombs mailed anonymously. A decision that the full force of the law should not be invoked to punish persons found guilty of such acts seems inconceivable. However, the political offense exception to the treaty of extradition has a long history of protecting persons rebelling against their governments.

This longstanding tradition among western nations is an acknowledgment of the right of the governed to oppose unjust governments. Although the nations, ours included, have acknowledged the heinous nature of violent political crimes, they have nonetheless, under treaties and statutes, denied extradition when an individual's conduct falls within the narrow exception for the "political offense."

I find that I can concur in much of Judge Reinhardt's opinion. In part I, Judge Reinhardt simply and eloquently outlines the facts and the difficult dilemma that confronts us. In Part II he rightly concludes that the determination as to what constitutes a political offense within the meaning of the treaty and the statute is a task for the court. I also agree with his discussion of the standard of review to be applied by both the district court and our court.

In Part IV, Judge Reinhardt ably documents the evolution of the political offense exception, paying particular attention to the development of the incidence test in the United States. His description of the conflicting approaches taken by various United States courts grappling with issues similar to ours highlights the difficult nature of our charge. In Part V, I wholly agree with his condemnation of international terrorism and his conclusion that acts of international terrorism not be protected under the political offense exception. I believe, as does Judge Reinhardt, that the traditional incidence test applied by courts of this country since the 1800's accomodates the exclusion of acts of international terrorism from protection. The new limitations imposed by the courts in *Eain v. Wilkes* and *In re Doherty* unnecessarily break from the traditional test by inquiring into and evaluating the le-

gitimacy of given political objectives and the conduct of internal political struggles. The political offense exception should be applied in an ideologically neutral fashion; it is neither necessary nor appropriate for courts to balance policy considerations. I believe the Seventh Circuit in *Eain* improperly rested its decision on its conclusion that only organized forms of aggression are afforded protection under the political offense exception and on its distinction between attacks on military and civilian targets. These limitations run counter to the reasons that originally supported creation of the political offense exception. I agree with Judge Reinhardt that the incidence test neither requires proof of membership in an uprising group nor recognizes a distinction between attacks on military and civilian targets. For these reasons I join Judge Reinhardt in rejecting the *Eain* test.

I concur in Judge Reinhardt's conclusion in Part VI that if an uprising existed at the time the offenses were committed, the bombings and the Tribble murder were incident to that uprising. I disagree, however, with his further conclusion that because the level of violence in Northern Ireland far exceeded that in England, the uprising did not extend to England.

I find persuasive the magistrate's and district court's findings that a severe political uprising existed in the United Kingdom, including England, at the time the acts of which Quinn is accused took place. The magistrate recognized the constitutional unity of Northern Ireland and Great Britain, and noted the numerous violent incidents that occurred in areas outside Northern Ireland, particularly in and around London. I cannot agree with

Judge Reinhardt's conclusion that when PIRA members revolt against their British rulers in Northern Ireland, such acts are protected under the political offense exception, whereas the identical violent acts carried out against the same British rulers in London lose their protected status.

I disagree that this interpretation of the "uprising" component of the political offense exception sanctions previously extraditable violent acts. Judge Reinhardt is rightly concerned that "uprising" not encompass "terrorism or other criminal conduct exported to other locations." I share his concern. But in my view, the acts of Irish nationists against the British in London are not international "terrorism or other criminal conduct exported to other locations." The longstanding ties between England and Northern Ireland, which Judge Reinhardt acknowledges are "well established," cannot be avoided or ignored. Although Northern Ireland may have been "separated" from Great Britain by treaty when the Irish Free State was created, it remained a part of the United Kingdom with representation in the British Parliament and it has been occupied by British troops lo these many years. The acts of terrorism in England by members of the PIRA can hardly be termed acts of international terrorism.

The magistrate in another extradition case involving a PIRA member charged with bombing a British military barracks in England reached this same conclusion. McMullen was found not extraditable because his acts fell within the political offense exception. *See In re McMullen*, No. 3-78-1899 MG (N.D. Cal. May 11, 1979), *reprinted in Extradition Act of 1981: Hearings on S. 1639 Before the*

Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 294, 294-96 (1981). I likewise conclude that Quinn's actions in London were part of an overall uprising in Northern Ireland and England.

Given my conclusion that the offenses of which Quinn is accused are protected under the political offense exception, I must address whether this protection extends to one who, like Quinn, is a citizen of a different nation from that in which the uprising is occurring. I do not believe that mercenaries or volunteers in a foreign conflict can claim protection under the political offense exception. I deduce from Judge Reinhardt's views on international terrorism that he would agree. To be entitled to protection, an individual would have to demonstrate tangible and substantial connections with the country in which an uprising occurs. It could be short of citizenship, but there must be a showing of substantial connection—for example, that he or she had lived in the country or territory and planned to continue to live there under a changed regime.

In Quinn's case, we lack sufficient information with which to make any such evaluation. We know that Quinn is a United States citizen, and that he resided in San Francisco during the years immedately preceding his arrest. In an Order Denying Bail. the magistrate noted Quinn's

> long standing family roots and ties in this [San Franciso] local community. He has a father and uncles and aunts here, he was educated here, and was employed in a family business at the time of his arrest. Except for a sojourn abroad, during which the alleged events occurred which resulted in the charges filed in the United Kingdom, he has for the most part resided in this community.

Because we do not know the extent of Quinn's ties to Northern Ireland, I would remand the case for an initial determination by the district court as to whether Quinn should be treated as an Irish national and afforded the protection of the political offense exception. Accordingly, I dissent from the holding that Quinn may now be extradited on the murder charge.

I agree with my colleagues that Quinn may not be extradited on the conspiracy charge at least until after the district court considers the question of the statute of limitations. However, I believe that the district court should not be required to reach that question unless it first concludes that Quinn's ties to Northern Ireland were insufficient to invoke the protection of the political offense exception. For the reasons I have explained, I concur in the holding remanding the conspiracy count.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
CRIMINAL NO. CR-81-0146-MISC

IN RE THE EXTRADITION OF
WILLIAM JOSEPH QUINN

SYLLABUS

(Filed Sept. 29, 1982)

William Joseph Quinn was arrested in Daly City, California, on September 30, 1981, on a warrant for provisional arrest issued by this Court on the request of the United Kingdom. Quinn has been held without bail since his arrest. On November 4, 1981, the governmeent of the United Kingdom of Great Britain and Northern Ireland formally requested the accused's extradition to stand trial in Great Britain on eight (8) charges: (1) the murder of police Constable Stephen Tibble in February, 1975; (2-4) sending three letter bombs; (5-7) three incidents involving time bombs; and (8) conspiracy to cause explosions beginning in 1974 and terminating with Quinn's arrest in the Republic of Ireland on April 3, 1975.

In accordance with the provisions of United States law and the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter the "Treaty"), the Court conducted inquiries to determine whether there was probable cause to believe the accused guilty of the offenses for which extradition was sought; whether extradition was timely requested; and finally, whether extradition was barred because the offenses charged are of a "political character."

(1) *Probable Cause*

The accused may be extradited to Great Britain only if Great Britain provides evidence against the accused such as "would justify his committal for trial if his offense had been committed in the territory of the [United States]." Articles VII(3); IX(1). This mandates a finding of probable cause, which may be defined as "facts or circumstances which would warrant a prudent man in the belief that an offense has been committed." The accused has no general right to introduce contradictory evidence in these proceedings.

a. *The Tibble Murder*

The Court found probable cause to believe that William Joseph Quinn shot Police Constable Stephen Tibble on February 26, 1975, on Challoner Road, London. This finding is based primarily upon the Affidavit of Constable Adrian Blackledge, who, on May 18, 1975, identified the accused as the man he detained coming from the area of Fairholme Road just prior to the shooting. This man, calling himself "William Rogers", ran from Blackledge rather than be searched or taken to the police station. In addition, Quinn's fingerprints were found in a "safe-house" at 39, Fairholme Road, and the murder weapon was later found in the possession of his alleged co-conspirators following their arrest at 22B, Balcombe Street, London.

b. *Conspiracy to Cause Explosions*

The United Kingdom withdrew counts two through seven of the Request for Extradition, leaving only the conspiracy to cause explosions remaining from the original

bomb related charges. The Court found probable cause to believe that William Joseph Quinn conspired with Brendan Dowd, Hugh Doherty, Harry Duggan, Edward Butler and Joseph O'Connell to cause explosions of a nature likely to kill, injure or cause serious damage to property. This finding is based upon similarities in design and/or materials employed in the time bombs found at Aldershot Railway Station, Kings Arms Public House and the American Hamburger Restaurant, and further linking those devices with "bomb-factories" discovered at 39, Fairholme Road, London; 40 Westridge Road, Southampton; 99 Milton Grove, London; 61, Crouch Hill, London, and 14, Oxford Road, Liverpool. In addition, there was a remarkable coincidence of fingerprints between the various bomb factories. Quinn's fingerprints were found on moveable objects in each such site; upon fixed and moveable objects at Fairholme Road; and on a newspaper used as packing material in the time bomb left at the Charco-Grill. Finally, it was probative that the Tibble murder weapon was found in the possession of some of the alleged co-conspirators (referred to as the Balcombe Street Four) who were apprehended and subsequently prosecuted in the United Kingdom nearly one (1) year after the Tibble murder.

(2) *The Statute of Limitations*
The Conspiracy Charge

The accused cannot be extradited on the conspiracy charge if prosecution is barred by lapse of time under the law of the requesting or Requested Party. The United Kingdom, the requesting Party, imposes no statute of limitations on what in essence is the conspiracy charge. The United States imposes a five-year statute of limitations

on the conspiracy charge. (Neither nation imposes any statute of limitation with respect to barring prosecution for the crime of murder.) Quinn's alleged involvement in the conspiracy, according to the Request for Extradition, terminated on April 3, 1975. The request was made in November, 1981. Thus, the statute of limitations was early implicated.

According to the law of the United States, the statute of limitations is tolled by the return of an indictment by a grand jury. The United Kingdom, having abandoned its Grand Jury system in 1933, argued that the "laying of an information" before a Bow Street Magistrate in 1976, charging Quinn with the conspiracy (and the murder) for which extradition is sought tolled the statute of limitations in like manner to an indictment. This Court is bound by the clear provisions of the statute incorporated into the Treaty. Since the laying of an information is not equivalent, substantially or procedurally, to the finding of an indictment by a Grand Jury, the Court finds that the laying of an information did not toll the statute of limitations.

However, the Court found that the statute of limitations was tolled by virtue of Quinn having fled from justice. Pursuant to Section 3290 of Title 18, United States Code, the statute of limitations is tolled by virtue of the accused's flight from justice, if the accused concealed himself with the intent to avoid arrest or prosecution by the government of Great Britain. The Court found that as of the date of the Tibble murder, Quinn was fleeing from justice. This determination based upon a preponderance of the evidence rests upon the facts that Quinn murdered

Tibble to avoid apprehension and arrest by Blackledge; Quinn's fingerprints were found in the bomb factory at 39, Fairholme Road, nearby Challoner Street where the murder was committed, that Quinn used a false name when stopped by Constable Blackledge; that he reappeared in the Republic of Ireland approximately one month later, having been arrested while using another alias, and finally, based upon the fact that he evaded immigration controls upon his exit from Great Britain. The Court further ruled that Quinn could not regain the benefit of the statute of limitations despite the fact that he returned openly to his home in the United tSates.

(3) *Political Offense Exception*

Quinn contends that he may not be extradited because (1) the alleged offenses were of a "political character", and (2) the Request for Extradition is essentially a subterfuge to prosecute him for political reasons, and (3) that the United Kingdom has not lived up to its obligations under various international agreements. The United Kingdom argued that these matters were within the exclusive province of the Executive Branch (State Department) and that this Court lacked the jurisdiction to resolve any of the aforementioned issues. The Court, following a long line of precedent, found that it lacks jurisdiction to deny extradition under subpart (ii) of Article V(1)(c) of the Treaty, but does have jurisdiction to make a determination of the political or non-political character of the charged offenses under subpart (ii).

Under domestic law, in order to succeed by reason of the political offense exception, the accused must prove by

a preponderance of the evidence that (1) there was, at the time and place of his offenses, a war, rebellion or other serious violent insurrection, (2) he was a member of the uprising group, and (3) the offense charged was incidental to and in furtherance of said war, rebellion or insurrection. The Court previously held that the accused neither testify nor admit the offense to take advantage of the exemption.

The Court found that a violent, politically-based insurrection existed in the United Kingdom during the early to mid-1970's. Primarily, this state of insurrection was extant in Northern Ireland, which is constitutionally a part of the United Kingdom. Evidence proffered in support of this element included first-hand knowledge by witnesses who had lived in London and Northern Ireland during the years in question. These witnesses reported the number of bombings, assassinations and other violence then taking place, and testified to the level of civic unrest they perceived among the Catholic communities in the North. Evidence regarding the governmental legal, political, military and diplomatic responses to said violence was also probative.

The Court found, however, that Quinn failed to establish the second pre-requisite for successful invocation of the political offense exception, i.e., that he was a member of the uprising group which was said to be the Provisional Irish Army [PIRA]. Quinn's evidence on the point was simply not persuasive. It consisted of evidence that he was convicted on April 3, 1975, in the Special Criminal Court in Dublin, of membership in the Irish Republican Army, a proscribed organization, and of testimony that

the Balcombe Street Four, with whom he is accused of conspiring, were tried as members of an Active Service Unit of the PIRA. Quinn himself did not testify. In rejecting the claim of membership, the Court reasoned that the period of Quinn's involvement in the conspiracy was of such a short duration that it was not supportive of membership in a para-military organization. Moreover, a defense exhibit notes that any organization such as the PIRA attracts common criminals. Finally, the Court found that the accused, as an American could not be found to be a member of the uprising group based upon such circumstantial proof absent some more direct evidence of his political involvement.

As to the third element of the political offense exception, the Court again found that Quinn failed to sustain his burden of proof that the charged offenses were incidental to and in furtherance of the political uprising.

a. *The Tibble Murder*

At the time he was shot, Police Constable Tibble was not in uniform and was unarmed. For all intents and purposes he was a passerby. Quinn did not testify nor offer the Court his motives, intent or concerns which culminated in the shooting of Tibble. Others, testifying on his behalf, speculated that such a shooting might be ascribed to a combination of reasons relevant to life in an Active Service Unit of the PIRA. First, there was testimony that such a life created a nervousness in the members of the Active Service Unit bordering on paranoia. There was, it was said, a fear that plain-clothes police and the Special Air Services personnel shot and killed republicans. Neither

such belief was well-founded regarding the London area. Finally it was argued that Quinn may have reacted by murdering Tibble to protect his gun and/or the security of the "safe-house." As to the latter contention, the Court found that his actions belied such an intention, and as to the first, such a "motivation" does not constitute an act in furtherance of the political goals of the uprising group.

b. *The Conspiracy to Cause Explosions*

The conspiracy to cause explosions involved, insofar as the proof before the Court illustrates, attacks against public and private property and persons unconnected with the Government of the United Kingdom. In other words, the conspiracy focused its attentions upon "civilians." Such cannot be considered either "incidental to" or in furtherance of the political goals of the organization because they were not directed against the government and thus lack the "nexus" required under the caselaw. Moreover, the proof demonstrated that the chain of command within the PIRA was weak at best. Assuming therefore, that the attacks were carried out by the Active Service Unit, it cannot be said with any certainty that they were sanctioned by the hierarchy. Instead, it is just as likely that such targets were merely targets of opportunity, used to dispose of excess explosives, or the product of personal vindictiveness. Examining the type of target and their apparently random nature, it is difficult to conceive of a manner in which they may be considered "in furtherance of" the violent political uprising to alter the government in Northern Ireland.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CRIMINAL NO. CR-81-146-MISC.

IN RE: THE EXTRADITION OF
WILLIAM JOSEPH QUINN.

This Memorandum of Decision is based upon all of the evidence and each of the arguments presented, with exceptions as noted in the following text. This was a proceeding for the extradition of a citizen of the United States, William Joseph Quinn, to the United Kingdom of Great Britain and Northern Ireland, pursuant to the provisions of the Extradition Treaty Between The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, [hereinafter designated the "Treaty"]. 28 United States Treaties 227, Treaties and other International Acts Series 8468.

JURISDICTION

The jurisdiction of this Court is based on Title 18, United States Code, Section 3184, which in the pertinent part provides:

> "Whenever there is a treaty or convention for extradition between the United States and any foreign government, . . . any magistrate authorized so to do by a court of the United States, . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the

> person so charged, that he may be brought before such . . . magistrate, to the end that evidence of criminality may be heard and considered."

This Court has been so authorized by the District Court for the Northern District of California. Local Rule 310-2(c).

The Treaty, Protocol of Signature and Exchange of Notes entered into force on January 21, 1977. (Declaration of Francis A. Armstrong, Attorney Advisior [sic], Office of the Legal Advisor, Department of State, certified by Alexander M. Haig, Jr., Secretary of State).

The person sought, William Joseph Quinn, was arrested on September 30, 1981, in Daly City, California, within the Northern District of California. Quinn was arrested on a warrant for provisionad [sic] arrest issued by this Court on the application of the United States acting for and on behalf of the United Kingdom. Warrants for provisional arrest are authorized in paragraph (1), Article VIII of the Treaty. The formal request for extradition was tendered on November 6, 1981, within forty-five days of Quinn's arrest as required by paragraph (2), Article VIII of the Treaty. Quinn has been held without bail since his arrest.

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SUFFICIENCY OF THE REQUEST FOR EXTRADITION.

The technical sufficiency of a request for extradition under the Treaty is dealt with in Article VII. Paragraph (1) requires the request be made through the diplomatic

channel. The request in the instant case was transmitted via Diplomatic Note No. 217, dated November 4, 1981. As required in paragraph (2)(a), the person sought, Quinn, was described and his nationality given. Diplomatic Note No. 217 contains a statement of the facts of the offense as required in subparagraph (b), as do the warrants, informations and depositions submitted therewith.[1] Subparagraph (c) of paragraph (2) of Article VII requires the text, if any, of the law (i) defining the offense(s); (ii) prescribing the maximum punishment for the offense(s), and (iii) imposing any time limit on the institution of proceedings. These requirements are met in the Affidavit of William Henry Walker, pages 210-15.[2] The same Affidavit contains a statement of the legal provisions establishing the extraditable character of the offenses for which extradition is sought in compliance with subparagraph (d) of paragraph (2) of Article VII.

Paragraph (3) applies where, as here, the request for extradition relates to an accused person, and states that the request must be:

> "Accompanied by a warrant of arrest issued by a judge, magistrate or other competent authority in the territory of the requesting Party and by such evidence as, according to the law of the requested Party,

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[1] Attached to the Request for Extradition were three bundles containing the evidentiary submission of the United Kingdom, labelled 'A', 'B' and 'C', in which the pages are sequentially numbered. Further references to that evidence are in parentheses, with the name of the affiant and the page number.

[2] The text of said offenses need not be duplicated here, but will be more fully reviewed in the section of this Memorandum regarding "evidence of criminality."

would justify his committal for trial if the offenses had been committed in the territory of the requested Party, including evidence that the person requested is the person to whom the warrant of arrest refers."

The predicate warrant was in fact submitted along with the evidence, the sufficiency of which is discussed below. The warrant was signed by Mr. H. J. Cook, Metropolitan Stipendiary Magistrate, West London Commission Area. The warrant for arrest and the attached evidentiary material may be received in evidence by virtue of the seal of the Secretary of State for the Home Office, the certification of Sir Brian Crossland Cubbon, KCB, Permanent Undersecretary, Home Office, and finally by the certification of John J. Louis, Ambassador of the United States of America in London tracking the language of 18, United States Code, Section 3190. Article VII(5)(a) and (b).

The warrant of arrest charges William Joseph Quinn with eight offenses, including murder, several bombings and conspiracy. Counts Two (2) through Seven (7) of the request were withdrawn by the United Kingdom, leaving two counts as the basis for the request for extradition. charging:

1) Murder of Police Constable Stephen Tibble on February 26, 1975, in Charleville Road, Kensington, London W.14. Contrary to the common law; and

2) Between the dates of January 1, 1974, and April 3, 1975, in the United Kingdom, he unlawfully and maliciously conspired with Shane Paul O'Doherty, Brendan Dowd, Hugh Doherty, Harry Duggan, Edward Butler and Joseph O'Connell, to cause by explosive substances, explosions in the United Kingdom of a nature likely to endanger life or

to cause serious injury to property, contrary to Section 3(1) of the Explosive Substances Act, 1883.

The offenses described above are "crimes provided for by [the] Treaty." Title 18, United States Code, Section 3184. Article III of the Treaty provides that:

(1) "Extradition shall be granted for an act or ommission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, . . ."

The annexed Schedule, *inter alia,* lists: (1) Murder; (3) Maliciously wounding or inflicting grievous bodily harm and (26) Malicious damage to property. Paragraph (2) of Article III of the Treaty provides:

(2) "Extradition shall also be granted for any attempt or conspiracy to commit an offense within paragraph (1) of this Article if such attempt or conspiracy is one for which extradition may be granted under the laws of both Parties and is punishable by imprisonment or other form of detention for more than one year or by the death penalty."[3]

Under the law of the requesting Party, unlawful and malicious conspiracy to cause by an explosive substance an explosion of a nature likely to endanger life or cause

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[3] It is settled that "law of both . . . Parties" refers to "proscription by similar provisions of federal law or, if none, the law of the place where the fugitive is found or, if none, the law of the preponderance of states." (Footnote omitted). *Cucuzella v. Keliikoa,* 638 F.2d 105, 107 & n.3 (9th Cir., 1981), citing *Shapiro v. Ferrandina,* 478 F.2d 894, 910 & n.18 (2nd Cir.), *cert. dismissed,* 414 U.S. 884 (1973); and *Brauch v. Raiche,* 618 F.2d 843, 849 (1st Cir., 1980).

serious injury to property, codified in Section 3(1) of the Explosive Substances Act of 1883 is punishable by imprisonment for life, subsection (b) of Section 3(1), and is an extraditable offense under Section 3(1)(a) of the Suppression of Terrorism Act of 1978 and the First Schedule of the Extradition Act, 1870. (Walker: 212-13). Domestically, conspiracy is proscribed in the United States by 18 U.S.C., Section 371, and in the State of California under California Penal Code (C.P.C.) Section 182. Extradition in this case is proper, then, if the evidence submitted discloses offenses proscribed by either of the latter two statutes.[4]

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THE BURDEN OF PROOF

Language such as that used in pargaraph (3) of Article VII, requiring "such evidence as, according to the law of the requested Party, would justify [the accused's] committal for trial," has been held to require a showing of probable cause. *Sindona v. Grant,* 619 F.2d 167, 175 (2nd Cir., 197); *United States ex rel. Sakaguchi v. Kaululukui,* 520 F.2d 726, 729-31 (9th Cir., 1975). Extradition hearings are of limited scope in the nature of a preliminary hearing.

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[4] Where the offense alleged is conspiracy, it is necessary that the offense also be extraditable under the laws of the requested party, in this case the United States. There is no special statute within Chapter 209 of Title 18 U.S.C., enumerating crimes for which extradition may be granted. Rather, Title 18 U.S.C., Section 3184 provides that extradition shall be granted for "crimes provided for by such treaty . . . ." As conspiracy to commit any of the offenses enumerated within Article III(1) of the Treaty are "crimes provided for by such treaty" by virtue of paragraph (2), the conspiracy is one for which extradition may be granted" under the laws of the requested Party. This is subject, of course, to the analysis of "dual criminality," pp. *infra*

Merino v. United States Marshall, 326 F.2d 5, 12 (9th Cir., 1963); *Sayne v. Shipley,* 418 F.2d 679, 685 (5th Cir., 1969). The committing magistrate's function is only to determine whether there is sufficient competent evidence to justify detention of the accused awaiting trial. *Collins v. Loisel,* 259 U.S. 311, 312 (1925). The purpose of these proceedings is not to determine the guilt or innocence of the accused. *Merino v. United States Marshal, supra,* 326 F.2d 12. Indeed, a certification of extradability embodies "no judgment on guilt or innocence of the accused but serves only to insure that his culpability will be determined in another and, in this instance, a foreign forum." *Jhirad v. Ferrandina,* 536 F.2d 478, 482 (2nd Cir., 1976). Such a certification is not a final order thus no direct appeal may be had. *Caplan v. Vokes,* 649 F.2d 1336, 1340 (9th Cir., 1981); *citing Collins v. Miller,* 252 U.S. 364, 369, 40 S.Ct. 347, 349, 64 L.Ed. 616 (1920).

While this and other courts have likened the extradition hearing to a preliminary hearing in state and federal courts, the Federal Rules of Criminal Procedure (hereinafter FRCrP) do not apply. *Simmons v. Braun,* 627 F.2d 635, 636 (2nd Cir., 1980); Rule 54 (b)(5) FRCrP. Excepting the rules regarding privileged communications, the Federal Rules of Evidence (hereinafter FRA) similarly do not apply. *Simmons v. Braun, supra,* at 636; Rule 1101 (d)(3), FRE. In fact:

> "'[T]he procedural framework of international extradition gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation.' *First National City Bank of New York v. Aristeguieta,* 287 F.2d 219, 226 (2nd Cir., 1960). Unique rules of 'wide latitude,' *in Re First National City Bank of New York,* 183 F. Supp. 865, 871 (S.D.N.Y., 1960), govern

> reception of evidence in Section 3184 hearings. Papers offered by the foreign country [sic] must be accepted. Deposition evidence inadmissible in a domestic preliminary hearing is admissible. [Wacker v. Bisson, 370 F.2d 552, 553 (5th Cir., 1967)] Hearsay evidence is admissible. *United States v. Artukovic,* 170 F.Supp. 383, 390 (S.D. Cal., 1959)."

Sayne v. Shipley, supra, 418 F.2d 685. See also, *Shapiro v. Ferrandina,* 355 F. Supp. 563, 571-72 (S.D.N.Y., 1973), *aff'd* 478 F.2d 894 (2nd Cir., 1973). Even the unsworn statements of absent witnesses proffered by the requesting Party may be acted upon. *Collins v. Loisel, supra,* 259 U.S. 317; *Shapiro v. Ferrandina, supra,* 355 F.Supp. 571. The certification may rest entirely upon heresay. *In re Ryan,* 360 F.Supp. 270, 273 (E.D.N.Y., 1973). Live testimony is neither expected nor required as it is inconsistent with the purpose of extradition and the intent of the contracting parties. *Bringham v. Bradley,* 241 U.S. 511, 517 (1916). This proceeding is clearly not intended to be a full trial on the merits. *Charlton v. Kelly,* 229 U.S. 447, 461 (1913).

Admissibility of evidence offered by the requesting Party is governed by paragraph (5) of Article VII of the Treaty, which provides:

> (b) "where the requesting Party is the United Kingdom, by being sealed with the official seal of the appropriate Minister and certified by the principal diplomatic or consular officer of the United States of America in the United Kingdom; . . . ;
>
> "or
>
> (c) "if it is authenticated in such other manner as may be permitted by the law of the requested Party."[5]

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[5] Authentication under United States law is governed in these proceedings by 18 U.S.C., Section 3190:

(Continued on following page)

Evidence pertaining to probable cause was submitted in accordance both with subparagraph (b) of paragraph (5) of Article VII of the Treaty, and in conformance with subparagraph (c), i.e., with 18 United States Code, Section 3190. See footnote 5, *supra*. The certification of United States Ambassador John J. Louis tracks the language of Section 3190, though such mimicry is not required. *Cucuzella v. Keliikoa, supra,* 638\F.2d 106-07 (9th Cir., 1981). Having so stated, I turn to a summary of the evidence admitted in support of the request for extradition.[6]

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EVIDENCE OF CRIMINALITY

A. MURDER OF POLICE CONSTABLE STEPHEN TIBBLE

On Wednesday, February 26, 1975, Constable Adrian Blackledge, dressed in plain clothes, was on patrol in the West Kensington Area of London for burglary suspects. He went to the Fairholme Road vicinity because of previous break-in activity reported there. Blackledge spotted a man

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(Continued from previous page)

"Depositions, warrants or other papers or copies thereof offered in evidence upon the hearing of any extradition case *shall be received and admitted* as evidence on such hearing for all purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that same, so offered, are authenticated in the manner required."

[6] The Ninth Circuit has observed that nothing contained herein may properly be deemed "findings of fact" in the traditional sense that the court has weighed disputed issues of fact. *Caplan v. Vokes, supra,* 649 F.2d 1342 n.10.

walking "evasively" and decided to follow him. Blackledge lost sight of his subject and called for his partner of the day, Police Constable Leslie James White. (Blackledge: 7-8). At approximately 1:50 p.m., after conducting a search of the area for evidence of burglary, Blackledge again espied the suspect, who reappeared on Fairholme Road walking towards Blackledge. Blackledge, who was alone, approached the suspect, and identified himself as a policeman from Hammersmith. Blackledge allowed the suspect to read his warrant card. (Blackledge: 9) Blackledge asked the suspect where he'd been and a conversation ensued concerning the Constable's right to ask questions.[7] After Blackledge volunteered to call a uniformed officer, the suspect conceded that Blackledge was "obviously a copper."

In response to the Constable's questions, the suspect stated that he had been at a friend's house on Fairholme Road, but did not know the number. (Blackledge: 9). The suspect identified himself as "William Rogers," residing at "213 North End Road, W.14." (Blackledge: 10). The suspect claimed he had no identification papers, but would not empty his pockets. Instead, he offered to show the Constable where he had been and began walking back towards Fairholme Road. Blackledge caught up with him, clutched his arm and informed the suspect that he would be searched either there or at the police station. The suspect broke loose, but was caught by Blackledge. Once

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[7] Although now repealed, sections four and six of the Vagrancy Act, 1824, made such stops permissible and were in effect in 1975. (Walker:215)

again the suspect broke free. Blackledge gave chase at a distance of approximately 20 yards. (Blackledge: 10).

While pursuing the suspect towards Charleville Road, Blackledge saw Temporary Detective Constable Dererk Hugh Wilson coming out of Challoner Street. A motorcyclist passed Blackledge who was still approximately twenty yards behind the running man. (Blackledge: 10; Wilson: 20). As the suspect reached Charleville Road, the motorcyclist passed him as well and alit from his motorcycle. The motorcyclist crouched facing the suspect with arms spread. (Blackledge: 10; Wilson: 21). As the two neared, shots were heard and the crouched motorcyclist fell to the street. The suspect never stopped running and was lost a short time later. (Blackledge: 10, Wilson: 21). Until they reached the fallen motorcyclist, neither Wilson nor Blackledge knew he was a policeman. (Wilson: 21). Constable White recognized the body as that of Police Constable Tibble. (White: 18). Tibble, not in a uniform, was wearing a light-blue windcheater covering a dark-blue woolen casual shirt, blue corduroy pants and a white crash helmet. (White: 18).

According to Blackledge, the suspect was heavily built, slightly tanned and had straight short, light-brown hair worn collar length. The suspect wore a fawn-colored jacket, plain fawn trousers, a blue T-shirt and brown shoes. Blackledge estimated his age at twenty-five to thirty years. (Blackledge: 11). The suspect spoke with a mellow Irish accent. (Blackledge: 11). Constable White's description is consistent with the above. (White: 18). Constable Wilson's description differs in two respects: Wilson states the suspect was slimly built, and had darkish-

brown hair. Wilson put the suspect's height at about five feet ten inches. Wilson could not identify the suspect's face, and apparently only saw the suspect as he was running. (Wilson: 19).

Tibble was taken to the hospital where he was treated for three gunshot wounds, one at the base of the left thumb and two in the right anterior chest wall. (Hoile: 23). Constable Tibble died at 4:40 p.m. following a sudden loss of blood. (Hoile: 24). David Aubrey Llewellyn Bowen, a pathologist, performed the post-mortem on Tibble, concluding that the cause of death was hemorrhaging from a firearm wound in the aorta. (Bowen: 24-28). Bowen removed two bullets from Tibble's corpse (Exhibits 2 & 3)[8] and delivered them to the exhibits officer. Detective Sergeant Swarbrick found three spent cartridges (Exhibits 4, 5 & 6; Swarbrick: 29). Detective Sergeant Swarbrick also took possession of Tibble's clothing at the hospital. (Exhibits 8, 9 & 10; Swarbrick: 29).

On Thursday, February 27, 1975, an officer from the Fingerprint Branch of New Scotland Yard conducted a search in the front basement room at 39 Fairholme Road, W.14., flat number eleven. (Bentley: 30). Detective Sergeant Napolitano was also present. He received a Star 45 revolver with magazine from the fingerprint officer. Napolitano removed a number of other items listed in Exhibit 75. (Napolitano: 31). On March 3, March 12 and April 28, 1975, Napolitano delivered these exhibits in

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[8] Exhibits are numbered with initial/number combinations and with progressive number designations as they appear in the depositions placed in the left margin. For ease and brevity, the Court will use only the latter to designate the relevant exhibits.

sealed bags to then Higher Scientific Officer (HSO) George Berryman. (Berryman: 34). These items of evidence were examined and described by Berryman in his Affidavit. Significantly, strong traces of nitroglycerine were found on many of the items removed from the flat at 39, Fairholme Road (Berryman: 34-41). Berryman's rather obvious conclusion was that viewed collectively the evidence was consistent with bomb-making activity. (Berryman: 41).

On May 13, 1975, two and one-half months after the Tibble murder, Rollo Alfred Watts learned that a suspect in the shooting of Constable Tibble, William Joseph Quinn was due to appear on the following day at the Special Criminal Court in Dublin, Republic of Ireland, on charges of being, *inter alia,* a member of the Irish Republican Army (IRA). (Watts: 45). Watts was stationed at the headquarters of An Garda Siochana (Garda) in Dublin. Police Constable Blackledge arrived the next day and was transported by Watts to Garda Headquarters. (Blackledge: 12; Watts: 45). Watts understood there would be no other chances to view the prisoner. (Watts: 45). En route to the Garda Blackledge was told the Garda might have the person who shot Tibble, but that he was under no pressure to identify anyone. (Watts: 46; Blackledge: 12). Watts cautioned Blackledge to make an identification only if absolutely convinced. (Watts: 46). Upon their arrival at Garda Headquarters, Watts was informed that the suspect, Quinn, had refused to take part in a formal identification parade and there would be no further opportunities to view him. (Watts: 46).

Upon their arrival at the Special Criminal Court, Watts cautioned Blackledge to be discreet. Blackledge was

not in uniform. (Watts: 45). Again, Blackledge was told that any identification should be founded only upon "firm recollection." (Watts: 46). Others in the courtroom were dressed in plain clothes. (Watts: 47). Sitting along the back of the courtroom were nine persons arranged in groups of three. Each triad, respectively, consisted of two uniformed officers flanking a man in plain clothes. (Blackledge: 12; Watts: 47). Blackledge immediately and positively identified "Rogers" as the person in the middle group of three though he had not yet heard the name Quinn nor heard "Rogers" speak. (Blackledge: 14, Watts: 47). Blackledge told Watts that he was absolutely certain of his identification though upon hearing the suspect later respond to the name "William Joseph Quinn" he acknowledged the suspect spoke with a quite different, American, accent. (Watts: 48; Blackledge 14).

Watts' description of the assemblage was considerably more detailed than that given by Constable Blackledge. The three plain-clothed persons were seated. The person on the far right sat on a slightly higher level than the other two. The suspect on the left and the suspect in the middle were wearing light-brown jackets over open-necked white shirts. The third suspect wore a light-colored jacket over a pink open-necked shirt. All were of similar build and age. The man on Quinn's right had a moustache. (Watts: 47). Watts further observed a slight difference in the uniforms of the persons flanking Quinn and the uniforms of the persons flanking the other two suspects, apparently attributable to the fact that the former were prison guards rather than police. (Watts: 47). For the most part, these details were either missed or omitted by Blackledge.

Prior to his identification of the man identified in court as William Joseph Quinn, Blackledge was neither aware of his custody by the Garda nor how the British authorities came to focus their attentions on him. (Blackledge: 15).[9] Though Blackledge heard Quinn speak, he could not compare the voice to that which he heard while questioning "Rogers" in February. (Blackledge: 14).

Watts picked Quinn from a photospread of twelve males (Exhibit 78) as the person Blackledge identified as the murderer at the Special Criminal Court in Dublin. (Watts: 50). Quinn's photograph (Exhibit 77) was taken after his arrest in San Francisco on September 30, 1981, and transported with a set of Quinn's fingerprints to England by Alan Lewis, Detective Chief Inspector, Metropolitan Police, New Scotland Yard. (Lewis: 49).

On December 12, 1975, a search was conducted at 22 Balcombe Street, N.W.1., following the arrest there of Joseph O'Connell, Hugh Doherty, Edward Butler and Harry Duggan, all named in charge eight as Quinn's alleged co-conspirators. (O'Connor: 42). One of the number of firearms taken by New Scotland Yard was a .380 Browning Automatic Revolver containing six rounds of ammunition. (Exhibit 76; O'Connor: 42). Brian Arnold, already in possession of Exhibits 2-10,[10] received the Brown-

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[9] Quinn questions the method of discovering his presence in Ireland, and more to the point, how it was that his identity was linked to that of Rogers.

[10] Exhibits 2 and 3 are the bullets taken from the body of Constable Tibble. Exhibit 7 is a spent bullet found near the scene of the murder, and Exhibits 4-6 are spent cartridge cases found at Charleville Road near where Tibble was slain.

ing revolver on the same day. He conducted a ballistics comparison and found that Exhibits 4-6, .380 ACP or 9mm ammunition, were each fired from the same gun, (Arnold: 43) and that each had been fired from the Browning. (Exhibit 76; Arnold: 44). While the bullets taken from Tibble's body revealed rifling characteristics similar to those fired from the Browning seized at 22B Balcombe Street, fine detail analysis was inconclusive. (Arnold: 44). Arnold further stated that the weapon had no tendency to misfire when treated roughly. (Arnold: 44).

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EVIDENCE OF THE CONSPIRACY TO CAUSE EXPLOSIONS OF A NATURE LIKELY TO ENDANGER HUMAN LIFE OR DESTROY PROPERTY.

Evidence concerning the bombing conspiracy is best understood if taken chronologically. The sole exception to this statement relates to the manner in which fingerprint evidence, presented in support of the alleged conspiracy, was derived.

In addition to the identification evidence developed in relation to the request for provisional arrest,[11] pages 385-413, comprising "Bundle 'C' " of the United Kingdom's evidence submitted in support of the request for extradition, and the Affidavit of Alan Lewis, filed with this Court on December 10, 1981, as part of the Supplemental Submission of Evidence by the United Kingdom in Support of Its Request for the Extradition of William

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[11] See Complaint for Provisional Arrest, Exhibit 'C', pp. 8-11 (Statement of Facts); pp. 12-13, (Schedule of Fingerprint Evidence); and Exhibit 'D', Declaration of Patrick J. Webb.

Joseph Quinn,[12] contain fingerprint evidence relating to Quinn's alleged involvement with the incidents and locations described below, and relating to the involvement of his alleged co-conspirators, both convicted and not.

Following his arrest in Daly City on September 30, 1981, Quinn was brought to the Federal Building in San Francisco where, observed by Alan Lewis, Detective Chief Inspector New Scotland Yard, he was fingerprinted. (Lewis: 143). Federal Bureau of Investigation Special Agent Patrick Webb performed the procedure, taking fingerprints (Exhibit 464), right and left palm prints (Exhibits 473, 471 respectively), and left and right rolled fingerprints (Exhibits 474, 475 respectively). Quinn refused to sign the prints, and the cards were then countersigned by Inspector Lewis and Agent Webb. Lewis personally carried the fingerprint cards to New Scotland Yard where, on October 8, 1981, he delivered them to Principal Scientific Officer [PSO] Barrington Edward Smith. (Lewis: 413; Smith 388; Exhibits 464, 471, 473, 474 & 475).[13] Actual comparisons with latent prints were made by PSO Smith.

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[12] This document, also containing the Affidavit of William Henry Walker, concerning the English law of conspiracy, was duly authenticated in the manner described at page 4, *supra*, thus entitling it to be received in evidence by this Court. Inasmuch as more than one supplemental submission of evidence was received, evidence derived from this Affidavit will be designated Walker [II], with page numbers and paragraph.

[13] Evidence submitted in support of the warrant for provisional arrest also included fingerprint evidence taken from Quinn surreptitiously. The prints so taken were compared with evidence submitted by the United Kingdom and with fingerprints obtained of William Joseph Quinn from the Republic of Ireland via Interpol. This evidence is not admissible with respect to the formal request for extradition under the statutory or treaty provisions previously described.

THE LETTER BOMBS

On January 22, 1974, a live high-explosive device concealed in a hollowed Holy Bible was received at 54, Ennismore Gardens, London, SW.7, addressed to Bishop Gerard William Tickle. The device was rendered safe. (Exhibits: 79-83; Biddle: 51-54).

On January 30, 1974, at his home at Haxted House, Haxted, Surrey, Crown Court Judge John Huxley Buzzard received a manilla [sic] envelope containing a thin book. As he removed black tape fastening the edges of the volume the package exploded in his hand resulting in injuries to his face and the loss of fingers. (Buzzard: 55; Bowen: 56). The amount of unexploded material scattered about the room indicated that only the detonator had exploded. (Smith: 58-59; Exhibits 84-90).

Five days later, February 4, 1974, the Assistant Secretary to Sir Max Aitken, Chairman of the Daily Express newspaper, was opening the latter's mail which had been delivered to his country home. (Palmer: 61; Henderson: 65). One such item was a brown envelope containing a book, which she removed. (Exhibit 91). Suspicious of its appearance, she turned it over to a security guard. (Paley: 61-62). The security officer lost most of one thumb and all the fingers of his left hand when the book exploded as he tried to set it on the table. (Meikle: 63; Wilkinson: 64). The room in which the bomb exploded was coated with explosive crumbs, indicating again that only the detonator and some of the explosive had exploded. The crumbs and other debris were collected. (Exhibits 91-97: Henderson: 66).

Each of the three devices or their remains were delivered to EM2 Branch, Royal Armanent Research and Development Establishment, Royal Arsenal East (RARDE). (Exhibits 79-80; Lidstone: 70; Exhibits 84-90; Holbrook: 60; Exhibits 91-97; Henderson: 66; Smith: 68; Holbrook: 69). Senior Scientific Officer [SSO] Lidstone analyzed the material and extracted three similarities amongst the respective devices including (1) the use of mallory battery cells, (2) 'W' shaped flaps separating the contact points for the electrical detonation systems, and (3) the use of hollowed books as repositories for the explosives. SSO Lidstone concluded that the devices were directly related and dangerous to persons handling them in transit. (Lidstone: 71).

From the manilla [sic] envelope/wrapper of the letter bomb sent to Bishop Tickle (Exhibit 79) fingerprints were developed, photographed (Exhibit 465) and compared, with the fingerprints obtained from the F.B.I. in September of 1981. (Exhibit 464; Sivell: 389; Anderson: 391; Smith: 390). The fingerprints matched. (Smith: 390). An identical procedure was followed with respect to latent prints raised from the envelope addressed to Judge Buzzard (Exhibit 87) containing the bomb. The photograph taken of the latents (Exhibit 466) was compared with and found to match Quinn's. (Exhibit 464; Sivell: 392; Smith: 393; Anderson: 394). Quinn's fingerprints were also compared with latents raised and photographed (Exhibit 467) from the "Aquarius Horoscope" book (Exhibit 96) which concealed the bomb sent to Sir Max Aitken, and once again were found a match. (Exhibits 464, 467; Anderson: 396; Smith: 395).

The fingerprints of Shane Paul O'Doherty were also found on the wrappings of the bombs sent to Judge Buzzard and Sir Max Aitken. (Lewis [II]: 2, ¶ 3. O'Doherty was alleged to be Quinn's co-conspirator in the 1976 Bow Street Magistrate's Warrant and in the predicate warrant. On September 10, 1976, he was convicted of several crimes including each letter bombing incident described above, but was not brought to trial on the conspiracy alleged in the warrants. (Lewis [II]" 2, ¶ 4).

OTHER INCIDENTS

The depositions of John Trenoweth and Colin Pruett describe a bombing incident which occurred on December 9, 1974, at a shopping arcade in Bath. (Trenoweth: 194; Pruett: 195). The depositions of Jack Everett, Kelvyn Malpas and Mervyn Bowden describe two bombing incidents taking place minutes and yards apart at Park Street, Bristol on December 18, 1974. (Everett: 196; Malpas: 197; Bowden: 198). The only forensic connection this Court can find, itself tenuous, is that Quinn's fingerprints were later found on a map of Bristol and Bath. (Exhibit 338; Smith: 407).

ALDERSHOT RAILWAY STATION, HAMPSHIRE

On Friday, December 20, 1974, an orange-colored hold-all was found abandoned on a loading platform at Aldershot Railway Station, Hampshire. Officer Trevor Roland Sharp forced the zipper lock and removed newspaper packed inside revealing several wires from which he deduced he had been dealing with a bomb. During the time he struggled with the hold-all, several trains laden with

passengers arrived and several passengers passed near the spot where the bag was discovered. (Sharp: 147-48). Detective Constable Kenneth Paley arrived shortly thereafter and recovered the contents of the bag, including Eversoft Frangex, two detonators, detonating cordtex, a battery and a length of blue sump safety fuse. (Exhibits 426-31; Paley: 149). Some of the material discovered was submitted for fingerprints, and all was eventually delivered to RARDE for analysis. (Paley: 150-51).

Then Principal Scientific Officer, [PSO], RARDE, Donald Percy Lidstone, previously mentioned in relation to his study of letter bombs, first analyzed the Aldershot device. The bomb was constructed using Eversoft Frangex as the explosive. Two delayed-action detonators were used, wired in a parallel circuit. The timing device was a Smith's Combat watch using a doubled looped wire as the intercept. (Exhibits 427-31; Lidstone: 165-67). The inclusion of blue sump safety fuse (Exhibit 431) was extraneous to the design of the bomb which was otherwise viable.

Harry Duggan's, Joseph O'Connell's and Hugh Doherty's fingerprints were found on material stuffing the hold-all. Joseph Gilhooley's fingerprints were found in various places on the timing mechanism itself. Gilhooley is yet a fugitive. (Lewis [II]: p.3, ¶16; p.10, ¶17).

KINGS ARMS PUBLIC HOUSE, WARMINSTER

On December 21, 1974, one day after the Aldershot Railway bomb was located, a light-brown attache/zip-up hold-all was found lying in the center of the entry archway to the Kings Arms Public House, Weymouth Street, War-

minster. Inside were several wires attached to a small clock. (Applegate: 153-54; Cresswell: 155). The device was defused and delivered to RARDE. (Exhibits 432-34; (Cresswell: 155-56). Among the items contained therein were Eversoft Frangex (Exhibit 432) and a trapezoidally-shaped Smith's Gay Gordon No. 3 alarm clock modified for use as a timing device. (Exhibit 433; Higgs: 157-58). A double-looped wire inserted through the lens was designed to act as an intercept. The clock had been further modified by removing the minutes hand. The alarm indicator had been bent back upon itself possibly to act as a safety stop. (Higgs: 158-59). Based upon PSO Higgs' twenty-one years experience in the field of explosives, the latter two features were considered by him to be very unusual. (Higgs: 159).

Other features of the bomb, relevant here, include: (1) the detonators, one a 1.5 second-delay copper model and the other aluminum, were wired in a parallel circuit; (2) the ends of each connecting wire exhibited "necking" as if pulled to the breaking point, and (3) each of the wires showed a "ridge-type" fracture indicative of certain type of cutting instrument. The necking feature is very unusual. (Higgs: 159-60).

Joseph Gilhooley's fingerprints were found on the inside of the clock dial of the timing mechanism. (Lewis [II]: 4, ¶7).

40, WESTRIDE ROAD, SOUTHAMPTON

On December 23, 1974, in a flat at 40, Westridge Road, Portswood, Southampton, Police Sergeant Raymond Patrick Murphy was fired upon by one of two men he was at-

tempting to question. He was chased *under gunfire from* the flat but subsequently was able to take cover and call for help. (Murphy: 132-35). In the ensuing gunbattle, three policemen were injured. (Lewis [II]:4, ¶8). Southampton police searched the flat on the following day, seizing numerous items. Of particular importance were a hold-all, blue-sump safety fuse, a copper detonator and several silver-colored detonators. (Exhibits 390-425; Betteridge: 137-42). Also seized were a torn blue "Basildon Bond" envelope illustrated with bomb circuitry diagrams (Exhibit 411), a "Who's Who" (Exhibit 403), and some ammunition. (Betteridge: 142-43). Officers located a box depicting a Smith's Gay Gordon No. 3 alarm clock containing what appeared to be a minutes-hand from a clock. (Exhibits 415, 416; Cole: 144). A spent bullet, presumably fired at Sergeant Murphy, was also located. (Exhibit 418). The bullet appeared to be brass-jacketed. (Harrigan: 145). Another bullet was vacuumed from a wall cavity at 13, Osborne Road nearby the scene of the gun battle. (Varley: 146).

Fingerprints were raised and photographed from the "Who's Who" (Exhibit 403) discovered at Westridge Road and photographed (Exhibit 472). They were compared with the F.B.I. fingerprint card for Quinn and were found to be a match (Exhibit 464; Langridge: 407; Barker: 408; Cole: 409-10; Smith: 411). The flat, which had been rented since November 23, 1974, also yielded the fingerprints of Dowd, Butler, Duggan, O'Connell, Doherty, O'Doherty and Gilhooley. The two gunmen were later identified as Ronald Joseph McCartney and John Walsh, both of whom left fingerprints at the flat. McCartney was later convicted of attempted murder and conspiracy to

cause explosions; Walsh is a fugitive. (Lewis [II]; 4-5, ¶8).

FORENSIC COMPARISON

RARDE forensic scientists PSO Higgs and SSO Lidstone, both previously mentioned, compared the evidence associated with the Aldershot and Kings Arms bombs and the evidence collected from the flat at 40, Westridge Road. (Higgs: 160; Lidstone: 168).

PSO Higgs noted several similarities between the three sets of evidence:

1. The copper 'H3' series detonator (Exhibit 393) from Westridge Road flat and the detonator of similar designation (Exhibit 434) used as part of the Kings Arms bomb displayed similar flaws under the '3';

2. Wire taken from both the Aldershot and Kings Arms bombs exhibited the extremely rare necking characteristic;

3. One-half inch black electrician's tape, significant by its rare use in bombs, was employed in the Kings Arms bomb and discovered at 40, Westridge Road;

4. The proprietary box found at the Westridge Road address (Exhibit 415) depicting a Smith's Gay Gordon No. 3 alarm clock matched in every detail the clock used as an electro-timer (Exhibit 433) in the Kings Arms bomb; and

5. The minutes-hand (Exhibit 416) found in the box (Exhibit 415) was similar in design to the hour hand of the Kings Arms bomb, the minutes-hand of which had been broken off at the ferrule.

PSO Higgs found these similarities and associations very important. (Higgs: 160-63).

PSO Higgs further compared his findings regarding evidence collected at Westridge Road with another bombing incident, (for which no descriptive depositions were supplied), at the Talbot Arms Public House, Chester Mews, London, on November 30, 1974.[14] He determined that two types of tape used in the Aldershot bomb had been used in only one previous bomb, that being the Talbot Arms device. (Higgs: 163). A distinctive feature of the latter bomb involved binding safety matches across blue sump safety fuse with cellophane tape. One of the sketches on the torn Basildon Bond envelope (Exhibit 411) found at Westridge Road was in Higgs' view "highly suggestive" of safety matches placed across a length of tape. (Higgs: 163).

Higgs noted three similarities between the Kings Arms and Aldershot devices: (1) The alarm indicator or seconds-hand in each had been bent back upon itself; (2) both used double-looped wire inserted through the lens as an intercept, and (3) the six-ounce cartridges of Eversoft

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[14] In the "Supplementary Affidavit of Alan Lewis (Regarding Conspiracy to Cause Explosions)" (Lewis [IV]), on pages 3-4 of the attached "Schedule of Incidents Attributed to Balcombe Street Four," a description of sorts appears. According to the Schedule, two "nail bombs," one of which exploded, were used in the Talbot Arms incident. Lewis [IV] was duly authenticated under the requirements described at p. 4, *supra*. As it was duly authenticated on May 12, 1982, in accordance with 18 U.S.C., Section 3191, it must be received in evidence. Due to its conclusory nature, the "evidence" contained therein was of limited probative value. The Court used the statements contained therein only so far as noted herein.

Frangex found in each bore similar batch markings, indicating a common source of supply. The first two of these features had never been seen outside these two bombs and thus are considered highly unusual. (Higgs: 163-64).

SSO lidstone analyzed the checkered hold-all (Exhibit 390) located at Westridge Road, finding it permeated with nitroglycerine, ammonium, nitrate, sodium and chlorate. (Lidstone: 168). Approximately fifteen pounds of sodium chlorate contained in a white plastic bag was also found. (Exhibit 391). Sketches on the flattened envelope (Exhibit 411), in his view, depicted a parallel detonator circuit similar to the Aldershot device. (Lidstone: 168-70). Lidstone further noted that the clock depicted on the proprietary box labelled "Smith's" Gay Gordon No. 3 alarm clock", was not located at the Westridge Road site. (Lidstone: 171).

SSO Lidstone concludes that the Westridge Road flat had been used to manufacture or at least plan explosive devices. The sodium chlorate discovered there can readily be converted into an incendiary bomb by adding sugar. (Lidstone: 172). Further, based upon the coincidence of the Aldershot bomb design and the sketch, upon the presence of cordtex fuse, blue sump safety fuse, the use of cellophane tape to seal the cordtex fuse, and by the fact that the hour hand of the Aldershot bomb's timing mechanism had been removed by fracturing rather than by snipping, as had the minutes-hand (Exhibit 416) found in the box (Exhibit 415) found at Westridge Road, Lidstone concluded that the Aldershot bomb and the flat at Westridge Road were connected. (Lidstone: 173).

PSO Higgs' and SSO Lidstone's conclusions are buttressed by the findings of another forensic officer, Godfrey James Osborne Lee, who through microscopic analysis determined that the minutes-hand found at Westridge Road had once been joined to the ferrule of the modified clock used in the Kings Arms bomb. (Lee: 175-78). Other forensic associations analyzed by Lee between the Kings Arms bomb, the Aldershot bomb, and the Westridge Road facility were not on the same order of probity. (Lee: 181). An analysis of the vegetation found in the Kings Ams device similarily adds little to the connection between that bomb and other bombs or bomb factories. (Cook: 182).

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CHARCO-GRILL BOMB

On January 28, 1975, a black bag was found laying inside the padlocked iron gate covering the entrance to the American Hamburger Restaurant, otherwise known as the Charco-Grill. (Lewis [II]: 5, ¶ 9), in the Kingswell Shopping District, Heath Street, NW 3. (Gurney: 72). Police were able to reach the bag only after cutting the padlock securing the gate. Crumpled newspaper/packing and a battery/watch combination attached by wires to detonators and embedded in plastic explosive were found inside the bag. The assembly was defused, repacked and taken to the Cannon Row Police Station where it was marked and sealed. (Exhibits 98-104; Gurney: 73-74). The assembly was later delivered to SSO Lidstone at RARDE. (Gurney: 74; Napolitano: 75; Lidstone: 76). The fifty two-ounce packages of Eversoft Frangex found in the bomb were connected to the timing mechanism which was a Smith's Com-

bat watch modified by inserting an intercepting pin through the crystal. The design was viable. (Lidstone: 76-78).

Fingerprints were raised from a piece of newspaper dated January 25, 1975, (Exhibit 104) packed in the bomb-carrying bag and photographed (Exhibit 468). These were matched with Quinn's. (Exhibit 464; Shapland: 398; Smith: 397). The fingerprints of Brendan Dowd, Edward Butler, Harry Duggan, Joseph O'Connell and Hugh Doherty were also found. With the exception of Dowd's fingerprints, which were found on parts of the bomb itself, all other fingerprints were found on the newspaper used to pack the bomb. (Lewis [II]: 5-6, ¶ 9).

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39, FAIRHOLME ROAD, LONDON

The events and discoveries which transpired on February 26, 1975, at 39, Fairholme Road, W.14, London, have already been described at pages 7-8, *supra*. Fingerprints were found on a table (Exhibit 456), a knife (Exhibit 457), a drinking mug (Exhibit 458, 459), and on an ashtray (Exhibit 460) within the flat. The photograph of these prints (Exhibit 461), and a latent print developed from a "Nicholson's London Guide" (Exhibit 462) and photographed (Exhibit 463), were eventually compared with Quinn's F.B.I. fingerprints. (Exhibit 464; Naylor: 387; Bentley: 385-86). They were found to match. (Smith: 388).

The flat had been rented since November 7, 1975. The fingerprints of Brendan Dowd, Hugh Doherty, Harry Duggan, Edward Butler, Joseph O'Connell and Joseph Gilhoo-

ley were found on various items in the flat. All of these persons except Gilhooley were alleged to be Quinn's co-conspirators in the 1976 Bow Street Magistrate's Warrant. All except Gilhooley are alleged to be Quinn's co-conspirators in the warrant underlying the instant request for extradition. (Lewis [II]: 3, ¶ 5).

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14, OXFORD ROAD, CROSBY

In the course of a search on July 10, 1975, at 14, Oxford Road, Crosby, police discovered a large number of firearms, ammunition, explosives and other items and equipment suitable for the manufacture of time bombs. (Thompson: 183). Among the firearms was a Dan Wesson .357 Magnum revolver. (Exhibit 441). A ballistics comparison of the revolver and a bullet found after the assault on Sergeant Murphy (Exhibit 418) proved positive. (Douch: 184; Hunt: 185-86). A cigarette package containing twelve rounds of .357 Magnum ammunition was also seized. (Exhibit 414; Hunt: 185-86).

Fingerprints developed on a map of the Marsden area (Exhibit 446) seized during the search, were compared to Quinn's fingerprint card (Exhibit 464) and found to match. (Smith: 412). Brendan Dowd's, Joseph O'Connell's, Hugh Doherty's and Joseph Gilhooley's fingerprints were also found. (Lewis [II]: 6, ¶ 10). As Quinn vociferously observes, the flat at 14, Oxford Road, was let on July 7, three days before its discovery and well after his incarceration in the Republic of Ireland. (Lewis [II]: 6, ¶ 10).

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THE BALCOMBE STREET SIEGE

On December 6, 1975, four men were chased by police and cornered at 22B, Balcombe Street, London, where they took hostages. (Lewis [II]: 6, ¶ 11). The siege continued for six days, during which time another bomb factory was discovered. As relevant to this case, the most significant important discovery at Balcombe Street was, of course, the Browning automatic pistol identified as the Tibble murder weapon. Several other weapons were found on December 12, 1975, after the siege was broken. One of these was a .38 Colt Special revolver containing six rounds of ammunition. (Exhibit 442; O'Connor: 187). Spent bullets taken from a Police Panda unit fired upon during the gun battle (Exhibits 420-422), at Westridge Road, and bullets found on nearby Osborne Road following the same incident, (Exhibits 418 and 419) were compared with bullets fired from the .38 Colt Special. One was identified as having been fired from that revolver. (Exhibit 420; Brunt: 189). All of the bullets were fired through the same type of barrel. (Exhibits 419-421; Arnold: 191-92).[15]

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[15] There is considerable discussion of evidence derived from and related to a bloody, bullet-scarred police tunic, SRC/4. As it is related forensically to Westridge Road, the Court assumes it is the tunic of one of the officers wounded on that date. Lacking further description of the circumstances of its treatment and further lacking any chain of custody, evidence relating to SRC/4 forms no part of the Court's decision in this case.

Following the siege, O'Connell, Butlel, Duggan and Doherty stood trial and were convicted of numerous crimes. The evidence introduced against them included the Aldershot Railway Station bomb and the Charco-Grill device. Many other offenses were made part of a separate indictment which was "left on file." (Lewis [II] : 9, ¶ 15).

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61, CROUCH HILL, LONDON

At the end of Balcombe Street Siege, December 12, 1975, officers of New Scotland Yard conducted a search of the top-floor flat at No. 61, Crouch Hill, Hornsey, London, W.4. (Howorth: 103). They found firearms, detonators, plastic-coated wires, ball bearings, ammunition and detonating cord inside a locked cabinet in the bedroom. (Exhibits 306-324; Howorth: 103-105). Many of these items were fingerprinted and then taken to RARDE. (Howorth: 108; Napolitano: 109-112). Police seized a total of ten-pounds-thirteen-ounces of Eversoft Frangex. (Exhibit 326; Highes: 114). Wires found were compatible with bomb-making activities, and the ball bearings could be used in conjunction with the explosives to make an anti-personnel bomb. (Hughes: 117-18). PSO John Hughes concluded that the materials discovered and seized at Crouch Hill were assembled for the express purpose of making timed explosives of an anti-personnel nature. (Hughes: 121-122). The presence of nitroglycerine on certain containers found there suggests their use in transporting or storing explosives containing nitroglycerine, e.g. Eversoft Frangex, supporting Hughes' view that the flat had been used as a "bomb factory." (Exhibits 313, 325 & 346; Hayes: 123).

Photographs were taken of latent prints (Exhibit 470), developed on a "Geographer's A-Z Bristol and Bath" atlas (Exhibit 338) and matched to Quinn's F.B.I. fingerprint (Exhibit 464) and left palm cards (Exhibit 464, 471). They were found to match. (Coombes: 404; Fitzpatrick; 405; Purdue: 406; Smith: 407). The fingerprints of Butler and Doherty were found on fixed and moveable items in the flat, while the fingerprints of Duggan, O'Connell and Keenan were found only on moveable items. (Lewis [II]: 6-7, ¶ 12). This flat was let on April 18, 1975, fifteen days after Quinn's arrest in the Republic of Ireland. (Lewis [II]: 7, ¶ 12; Lewis [III]: ¶ 13).[16]

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99, MILTON GROVE, LONDON

On December 16, 1975, during the so-called Balcombe Street siege, a "safe-house" was located and searched at 99, Milton Grove, London, N.16. A number of items were discovered and removed from a concealed compartment in the bathroom. Among said items were plastic carrier bags, pipe, loose electric detonators and a London Atlas. (Exhibits 141-155; Henderson: 79-81, 83). Another group of items was seized from a wardrobe in the bedroom, including a number of cardboard boxes and an alarm clock. In the lobby, searchers found a container filled with wire nails. (Exhibits 107-140). Many of these objects, e.g., clothespins, were of no apparant use in relations to the facilities of the flat, but were consistent with

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[16] Lewis [III] is the Affidavit of Inspector Alan Lewis regarding the Statute of Limitations, attested on December 16, 1981.

components of bombs used in the London area. (Henderson: 85). *The flat was photographed and fingerprinted.* Police made lists of the items seized. (Exhibits 156, 292; Vicqery: 86-88). Seven alarm clocks, six modified Smith's Combat watches, and ten gas igniters were among the items seized. Light bulb assemblies which could be used to test bomb circuits were located, as were objects of a more clearly explosives related significance, e.g., detonators and blasting caps. Finally, police discovered a Smith's alarm clock modified by removing the minutes-hand and boring a hole in the clock's face at the ten o'clock position. (Exhibit 138; Berryman 89-98).

Latent fingerprints were developed from a "Kenning Road Map of Great Britain" seized in the search of the Milton Grove flat. (Exhibit 162). They were photographed (Exhibit 469) and compared with Quinn's F.B.I. fingerprint card. (Exhibit 464). They matched. (Burden: 399; Fitzpatrick: 400; Purdue: 401; Smith: 402). The flat had been let since March 1, 1975. The fingerprints of Butler, Duggan, O'Connell and Doherty were found on "numerous fixed and moveable items." (Lewis [II]: 7-8, ¶ 13). The fingerprints of Brian Keenan were developed on a piece of paper, a book and a carrier bag at the same address. (Lewis [II]: 7, ¶ 13). Owen Keenan was convicted in June, 1980, at the Central Criminal Court of London of conspiracy to cause explosions involving the same men (excepting Quinn) as alleged in the predicate warrant in this case. Inspector Lewis avers that the evidence supporting Keenan's conviction was, in the main, just such fingerprint evidence as submitted herein. (Lewis [II]: 9, ¶ 16).

Of passing interest to the Court were the lists discovered in the flat at 99, Milton Grove, containing the names of numerous police officers, members of Parliament and several business establishments. (Exhibits 292; Lewis [II]: 8, ¶ 14). There is a limited coincidence between these lists and acts of violence to the persons named therein. (Lewis [II]: 8-9, ¶ 14).

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FORENSIC CONNECTIONS

Crouch Hill and Milton Grove were linked by species of tapes, unusual by themselves, found at both locations. (Exhibits 108, 116, 119, 120 & 139; Lee: 124-27). Cut drawing pins found at Milton Grove had been cut by wire cutters found at Crouch Hill. (Exhibits 358). Blue PVC tape taken from Crouch Hill was found similar to blue tape discovered at Milton Grove. (Lee: 128-29). Milton Grove was additionally tied to another otherwise undiscussed bomb-making facility discovered in December, 1975, located on "Rossmore Road." A section of wooden rifle stock found there (Exhibit 304) belonged with a carbine discovered at the Milton Grove flat. (Exhibit 157; Mansfield: 100; Arnold: 101). The rifle stock was discovered after an unsuccessful pursuit of Harry Dugan, Joseph O'Connell, Edward Butler and Hugh Doherty. (Mansfield: 100).

PSO Geoffrey Higgs was presented as a "summary witness" in an attempt to draw together various similarities between the bombing incidents taking place in London and the Home Counties between November 25, 1974, and

January 27, 1975, and to associate those incidents with the "bomb-factories" located up to December, 1975. (Higgs: 200). He noted the following connections.

The search of the Oxford Road address uncovered 458 pounds of Eversoft Frangex and Gelamex, and a large number of plain and electrical detonators. Rarely seen American-made detonators were found both at Oxford Road and in the Talbot Arms Public House bomb. (Higgs: 201). Lengths of Cordtex detonating fuse and blue sump safety fuse were also found. Other explosives-related evidence removed from Oxford Road included percussion fuse igniters, modified and unmodified clocks, and a large quantity of sodium chlorate. Based upon the sheer quantity and variety of material found, Higgs concluded that Oxford Road was used as a "depot" for explosives and related materials entering England from the Republic of Ireland and elsewhere. (Higgs: 200-201).

Identical batteries indicated a link between the Oxford Road address and the Aldershot, Kings Arm and Putney High Street bombs.[17] Spring-activated wooden clothes pegs had been modified for use as delayed arming devices like ones found at 39, Fairholme Road. (Higgs: 201-202). Detonator wires found in the Oxford Road flat were associated by type with the Aldershot, Kings Arms, Putney High Street and Charco-Grill bombs. (Higgs: 202).

The paraphernalia found at 39, Fairholme Road was widely contaminated with nitroglycerine. However, only

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[17] The Putney High Street bomb is not described in any of the evidence submitted to this Court except Lewis [IV], at p. 6 of the Schedule. See footnote 14, *supra*. It is also known as the "Easifit" bomb. (Higgs: 202).

the modified Smith's Combat watches, black bituminous cambric tape and the glossy black adhesive tape could be associated with the incidents at Aldershot, Kings Arms and the Charco-Grill. (Higgs: 202-203). This limited overlap of evidence did not diminish Higgs' rather obvious conclusion that 39, Fairholme Road was used as a bomb-making facility in light of the assortment of items seized and the aforementioned contamination. (Higgs: 203-204).

The bomb-making facility at 40, Westridge Road was in Higgs' estimation connected to the Kings Arms bomb by reason of the coincidence of the variety of tapes found and utilized, the flawed copper 'H3' detonators and by a sketch of the Basildon bond envelope suggestive of bomb circuits wired in parallel akin to the configuration of the Kings Arms and Aldershot devices. Further, a facsimile of an Everready 4.5 volt 126-type battery used in the Aldershot, Kings Arms and "Easifit" bombs was drawn on the same envelope. (Higgs: 204-205). Another design sketched on the envelope was apparently put into practice in the Talbot Arms bomb, utilizing plain copper detonators in combination with blue sump safety fuse and matches attached thereto by cellophane tape. The sketch on the envelope resembled four matches placed across a length of tape.

The Aldershot and Talbot Arms bombs are associated by the use of never-before-seen one-inch matt black PVC tape, .75 inch buff-colored masking tape, and 1.5 inch white cambric tape. (Higgs: 205-206). Westridge Road is even more tightly bound to the Kings Arms bomb by the fact that the box and minutes-hand found in the flat were formerly part of or packaged the alarm clock used

in the Kings Arms bomb as a timing device. (Higgs: 206-207). Finally, the 'H3' detonators discovered at Westridge Road and used again in the Kings Arms device exhibited identical flaws, once again typing the incident and the location together. (Higgs: 206-207).

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DISCOVERY AND PRESENTATION OF EVIDENCE BY THE ACCUSED.

The accused offered no evidence on the issue of criminality other than a written offer of proof filed on March 16, 1982, and an informal representation at a hearing before the Court on February 17, 1982. Quinn served identical subpoenaes upon Government counsel directed to the United States and the United Kingdom. The subpoenaes requested, *inter alia,* information pertaining to the United Kingdom's knowledge of Quinn's whereabouts during the six and one-half year hiatus between the Tibble shooting and his arrest in Daly City. These requests are relevant, in the main, to his defense based upon the statute of limitations, Title 18 United States Code, Section 3282, *et seq.,* and to the diligence of the requesting Party which he asserts is an element of said defense. Insofar as they relate to the statute of limitations defense, the requests will be discussed at pages 59-74, *infra.* Other requests are arguably relevant to the "political offense exception," and to the extent they seek such information, the requests will be

discussed in the section of this Decision relating to that exception.[18]

Paragraph's eight through thirteen[19] are applicable to this stage of the proceedings. The first three of this set, paragraphs eight through ten, seek Federal Bureau of Investigation, Department of Justice, Immigration, Scotland Yard and Republic of Ireland criminal, investigative and intelligence files. Paragraphs eleven through thirteen, inclusive, seek production of original fingerprint, photographic and other physical evidence used to identify Quinn and to establish probable cause.

Documents requested in the former category, it is alleged might produce additional statements of witnesses to the Tibble shooting, as well as, aid in the development of the "totality of the circumstances" surrounding the identification of William Quinn as the perpetrator in the Tibble shooting. (Offer of proof, p. 5 n. 2). See page 41, *supra.* Evidence in the latter category could be used to contradict the forensic testimony of the United Kingdom's wit-

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[18] An additional justification for said discovery is raised in the accused's Offer of Proof re Discovery of Government Documents, filed March 16, 1982, at pages 1-2. Apparently, some of the information is thought necessary to counter certain perceived embellishments by the United Kingdom not supported by the record. Although these arguments are more fully addressed in the section of this Decision concerning the political offense exception, it is sufficient at the present to say that the Court takes no cognizance of undocumented assertions.

[19] Paragraph 11, seeking the fingerprint card sent by the Republic of Ireland via Interpol to the F.B.I. was withdrawn by the accused.

nesses. I held that the subpoenaes were overbroad and thereford [sic] quashed them.[20] (Reporter's Transcript, February 17, 1982, at p. 35, lines 5-23, p. 36, line 1).

As previously noted, neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure are applicable to this hearing.[21] However, at first blush, Section 3191 of Title 18, United States Code, would suggest some authority for the discovery requested by the accused. Section 3191 authorizes the Court to issue subpoenaes to witnesses and pay for their appearance when, in an Affidavit filed by the accused, he avers:[22]

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[20] The attorney for the United Kingdom, representing both the United States of America and the United Kingdom in their attempt to quash the subpoenas, raised numerous other grounds to block production of said evidence. See Response of the United States and the United Kingdom to Subpoenas Duces Tecum and Points and Authorities in Support of Motions to Quash Subpoenas Duces Tecum, filed November 27, 1981. Among these were improper service, insufficient demonstration of need to justify the exercise of this Court's inherent powers, that each subpoena sought information not within the control of the subpoenaed party, and that each sought information irrelevant to the extradition proceeding. The second and, fourth of these objections form part of the Court's decision to quash the subpoenas. Having so decided, I have no occasion to pass upon the merits of the other two.

[21] This is not to say that evidence admissible at trial under the Federal Rules of Evidence is not admissible herein. See Magistrate's Opinion, In the Matter of the Requested Extradition of Desmond Mackin by the Government of the United Kingdom of Great Britain and Northern Ireland, pp. 18-19 (footnote), citing Weinstein & Berger, Weinstein's Evidence, ¶ 1101 (1978).

[22] For reasons unbeknownst to the Court, Quinn did not attempt to establish his right to discovery even against the United States under Section 3191. He filed no Affidavit meeting the requirements quoted on page 44.

> "that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or magistrate hearing the matter may order that such witnesses be subpoenased [sic]; . . . ."

Section 3191, despite its broad language, is not a panacea for fugitives requesting discovery.

Construing a statutory predecessor to Section 3191, The Supreme Court found it to be "most inartificially drawn." *Charlton v. Kelly, supra,* 229 U.S. at 457-58. The Court went on to explain that "[i]n no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing." *Id.* at p. 458. The statute's importance in extradition proceedings was further eviscerated by the Ninth Circuit in *Merino v. United States Marshal, supra,* 326 F.2d at 12, wherein it was held that Section 3191 does not empower the defendant to direct subpoenas to nonresident witnesses. In *Jiminez v. Aristeguieta,* 311 F.2d 547, 556 (5th Cir., 1962) it was held that the statute does not permit the taking of foreign depositions. See also, *Oteiza v. Jacobus, et al.,* 136 U.S. 330, 10 S.Ct. 1031, 34 L.Ed. 464 (1890); [citing with approval *In re Wadge,* 15 Fed.Rep.864 (1883)]. Moreover, it is well-recognized that the "unique rules of 'wide latitude'" applicable to evidence submitted by the requesting party are not available to the accused. *Sayne v. Shipley, supra,* 418 F.2d at 685. See *Jiminez v. Aristeguieta, supra,* 311 F.2d at 556, and cases cited therein.

Without express statutory authorization, the accused must rely upon the "inherent authority" of the court, first recognized in *First National City Bank of New York v.*

Aristeguieta, 287 F.2d 219, 225-26 (2nd Cir., 1960), *vacated as moot,* 375 U.S. 48 (1970). As the accused's right to introduce evidence is limited, the right to discovery must similarly be limited. *Id.* The classic statement regarding introduction of evidence by the accused is that given by the Supreme Court in *Charlton v. Kelly, supra:*

> "To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the government."

Id. 229 U.S. at 461 (quoted in *Collins v. Loisel, supra,* 259 U.S. 472). The extent to which "explanatory evidence" is admissible rests largely within the discretion of the committing magistrate. *Matter of Sindona,* 450 F.Supp. 672, 685 (S.D. N.Y., 1978) *aff'd* 619 F.2d 167 (2nd Cir., 1980). The requesting party need not produce "exculpatory evidence." *Id.* at 687.

The accused, to his credit, has not made an "attempt to bring to bear all of the factitious niceties of a criminal trial at common law." *Glucksman v. Henkel,* 221 U.S. 508, 512, 31 S.Ct. 704, 705 (1911). It is, nevertheless, useful to list the restrictions upon evidence offered by the accused in order to illustrate the Court's rationale for denying Quinn's discovery.

It is proper to deny admission of evidence pertaining to an insanity defense. *Charlton v. Kelly, supra.* Evidence relevant to an alibi may similarly be excluded. *Desmond v. Eggers,* 18 F.2d 503, 505-06 (9th Cir., 1927). Evidence that another perpetrated the crime may be excluded, *Peroff v. Hylton,* 542 F.2d 1247 (4th Cir., 1976), *cert. denied* 429 U.S.

1062 (1977), *rehearing denied,* 429 U.S. 1124 (1977), as may evidence seriously impeaching a witness presented against the accused. *Peroff v. Hyleton,* 563 F.2d 1099, 1101 (4th Cir., 1977). Evidence offered by the accused to show that alleged co-conspirators have been acquitted in the courts of the requesting party is inadmissible. *Freedman v. United States,* 437 F.Supp. 1252, 1267 (N.D., Ga., 1977). Evidence posing conflicts to the credibility of affiants or deponents offered by the demanding country in support of its request for extradition is properly deemed inadmissible. *Shapiro v. Ferrandina, supra,* 478 F.2d at 905.

The Fourth Circuit Court of Appeals has stated that "the accused cannot introduce any evidence which would be admissible upon a trial under an issue of not guilty.' " *Sayne v. Shipley, supra,* 418 F.2d at 685 (quoting *Charlton v. Kelly, supra,* 229 U.S. at 458). The Fourth Circuit further held that "properly [the accused] may only introduce evidence rebutting probable cause." *Sayne v. Shipley, supra,* at 685 (citing *Collins v. Loisel, supra,* 259 U.S. at 316. The former statement is not supported by the context of the quoted portion of the opinion in which the Supreme Court merely disagreed with the accused that Title 18 United States Code, Section 3191 opens the extradition to *all* issues applicable at trial under a plea of not guilty. *Charlton v. Kelly, supra,* at 316. Moreover, "rebuttal evidence" is clearly a category more inclusive than that to which the accused is entitled.[23] Again, this statement is not supported by the cited authority, which limits the accused to explanatory evidence. See *Collins v. Loisel, supra.*

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[23] *Black's Law Dictionary* defines "rebuttal evidence" as "evidence given to explain, repel, counteract, or disprove facts given in evidence by the adverse party."

In *Merino v. United States Marshal, supra,* 326 F.2d at 13, the Ninth Circuit found the accused's due process assertions based upon a trio of Supreme Court cases inapplicable to extradition hearings. By implication then, illegally seized evidence may be utilized by the demanding country. See *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), ("silver platter" doctrine held unconstitutional). Also held inapplicable to these proceedings was the due process requirement that the prosecution delivered to the defendant documents relevant to his defense as established in *Jencks v. United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). The defendant's right to production of exculpatory evidence created in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) may not be asserted by him in these proceedings. "[T]he principles set forth in the cases are not applicable to a preliminary examination in an international extradition case." *Merino v. United States Marshal, supra,* 326 F.2d at 13 (*citing Oteiza y Cortes v. Jacobus,* 136 U.S. 330, 334-38, 10 S.Ct. 1031, 1033-34, 34 L.Ed. 464 (1890)).

With these precepts in mind, I reaffirm my view and order that the subpoenas as constituted were overbroad. Mere evidentiary material, for example the fingerprints, could only be used to conduct an independent forensic comparison with a view towards contradicting the witnesses for the United Kingdom. This is an impermissible objective. *Charlton v. Kelly, supra,* 229 U.S. 461.

Similarly, the "totality of the circumstances" regarding the line up is an issue more properly raised at trial. Quinn's arguments in support of the requested discovery find no support case law for their application in this unique

proceeding. Each of the cases cited by the accused find only that a criminal defendant's due process rights are violated, if at all, when the unreliable evidence is admitted *at trial*.[24] The possibility that there may have been a line-up not attended by Blackledge (Reporter's Transcript, February 17, 1982, page 30, line 15 through page 31, line 1), in no way diminishes his credibility on the question of probable cause.

Finally, I believe that the requested discovery of the criminal, investigative and intelligence files of the requested country, and of physical evidence, violates spirit of comity upon which the international extradition of fugitives is based. See e.g. *Factor v. Laubenheimer,* 290 U.S. 276 (1933) (discussing "dual criminality"), *Jhirad v. Ferrandina,* 377 F.Supp. 36, 36 (S.D. N.Y., 1974); *aff'd* 536 F.2d 478 (2nd Cir., 1976). I hold to my view that the exercise of the Court's inherent power, to the extent it exists, is unwarranted in this case. See *First National City Bank of New York v. Aristeguieta, supra,* 287 F.2d 225, 226. The subpoenas seek information completely beyond the scope of these proceedings.

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[24] See e.g., *Stovall v. Denno,* 388 U.S. 296, 297-98, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); *Manson v. Braithwaite,* 432 U.S. 98, 112, 97 S.Ct. 2243, 2252, 53 L.Ed.2d 140 (1977) ("*Wade* and companion cases [*Stovall v. Denno, supra; Gilbert v. California,* 388 U.S. 263 (1967)] reflect a concern that the *jury* not hear eyewitness testimony unless that evidence has aspects of reliability.")

. . . .

DETERMINATION OF PROBABLE CAUSE

The requesting Party, as has been noted, must demonstrate that probable cause exists to believe that an extraditable crime has been committed, that the defendant committed it, and that said conduct would be a violation of domestic criminal law. *Peroff v. Hylton, supra,* 542 F.2d 1249. Probable cause has been defined as facts or circumstances sufficient to warrant a prudent man in believing that the accused committed an offense. *Beck v. Ohio,* 379 U.S. 89, 91 (1964). It rests upon a showing of probability rather than *prima facie* proof. *Id.* at 96; *United States v. Whitney,* 633 F.2d 902, 906 (9th Cir., 1980). Probable cause may be found where "a prudent person could say that . . . an innocent course of conduct was substantially less likely than a criminal one." *United States v. Patacchia,* 602 F.2d 218, 220 (9th Cir., 1979); *United States v. Patterson,* 492 F.2d 995, 997 (9th Cir., 1974), *cert. denied,* 419 U.S. 846 (1974).

A. PROBABLE CAUSE RE MURDER

P. C. Stephen Tibble died on February 25, 1975, of gunshot wounds received in Charleville Road earlier that day. Tibble was dressed in plain clothes and was unarmed.[25] His assailant was running from a police officer. There is no evidence that Tibble identified himself as a police officer or that he was otherwise identifiable as such.[26]

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[25] No firearm is mentioned in connection with his personal effects. (See Affidavits of Hoile, Bowen and White).

[26] Quinn correctly observes that statements of other witnesses, if there were any, might contradict such an inference. Offer of Proof, p. 1-2. Whether or not he so identified himself is irrelevant to the crime of murder.

On these assertions, there is probable cause to believe that a murder was committed. As defined by the common law of Great Britain, federal law, and the law of the State of California, which are not surprisingly functional equivalents, murder is the unlawful killing of a human being with malice aforethought. Walker: 210; Title 18, United States Code, Section 1111; California Penal Code (C.P.C.), Section 187. Malice may be implied from the absence of sufficient provocation or the use of a deadly weapon. *United States v. Vallez,* 653 F.2d 403, 406 (9th Cir., 1981); *United States v. Celestine,* 510 F.2d 457, 459-60 (9th Cir., 1975). See also California Penal Code, Section 188.

The particular act charged is criminal in both jurisdictions.[27] See *Factor v. Laubenheimer, supra.* Murder is "a crime provided for by [the] treaty," 18 United States Code, Section 3184, by virtue of paragraph (1) of Article III of the Treaty and category one of the annexed schedule. See page *supra.* Murder is punishable by life imprisonment in both jurisdictions, and is an extraditable offense under Section 26 of the Extradition Act of 1870 and the First Schedule annexed thereto. (Walker: 210-11).

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[27] The federal law of murder is to be applied in this case. *Cucuzella v. Keliikoa, supra,* 638 F.2d 107.

. . . .

The more difficult question is whether probable cause exists to believe that the accused is the person named in the warrant, that is, the perpetrator. Of paramount importance in this regard is the identification of Quinn by P. C. Blackledge at the Special Criminal Court in Dublin, Republic of Ireland, in May, 1975. Taking into account all of the evidence submitted by the United Kingdom concerning the identification procedure, there is sufficient reason to believe that the person identified by Blackledge in the Dublin Court was the person who shot Constable Tibble. See *Escobedo v. United States,* 623 F.2d 1098, 1102 (5th Cir., 1980), (single photograph identified by witness sufficient to support probable cause finding).[28] The meeting in the road, provides a sufficient basis for his identification to support finding of probable cause by this Court.[29]

Inspector Watts' identification similarly provides probable cause to believe that the person identified by Blackledge and addressed by the name William Joseph Quinn is the accused herein. I have reviewed the photo array and have in mind the circumstances under which Watts first viewed the accused. Though his identificaton is not free from doubt, coming as it did six years after he first saw the prisoner and because it is in effect double hearsay, I find that it constitutes probable cause to believe

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[28] There is little question that "Rogers" shot Tibble as evidenced by the location of the wounds and the sequence of events.

[29] A more detailed analysis of the identification testimony is set forth below in the portion of this Decision concerning the statute of limitations.

that the accused is the man identified by P. C. Blackledge at the court in Dublin.[30]

Evidence submitted chiefly in support of the bombing allegations, detailing the revelations at Fairholme Road and the unearthing of the murder weapon are not in themselves adequate to support a reasonable man in the belief that the accused was the murderer. However, finding Quinn's fingerprints at what appears to have been a working bomb factory, both places him in the area at the relevant time and provides a possible explanation of his motives in the shooting. As the murder weapon was found in the possession of Quinn's alleged co-conspiracors, the .380 Browning can be tied to him.

B. EVIDENCE OF A CONSPIRACY TO CAUSE EXPLOSIONS

There predictably is no direct evidence of an agreement between the alleged co-conspirators. The Government, however, need no such formal agreement. *United States v. Camacho*, 538 F.2d 464, 469 (9th Cir., 1976).

I find ample support for the conclusion that the same person or persons constructed and delivered the letter bombs through the accordance of battery types, the means of delivery and the similarity of design.[31] This conclusion is buttressed by the fact that all three devices were received within a two-week period. As each device was de-

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[30] Double hearsay is not an objection to admissibility of the identification. See *Escobedo, supra*, at 1102. However, the Court is cognizant of the dangers of such testimony.

[31] There is no direct evidence that the packages were actually delivered through the mails, though the Court infers the same from the record.

livered to a different address, the discovery of Quinn's fingerprints on the envelopes of two of the packages strongly suggests his contract [sic] with them at or near the point or points of origin. This is confirmed by finding his fingerprints on the book cover of the third device. These devices were clearly destructive, and thus it is probable that Quinn was consciously involved in, at the very least, their transmittal. I reached an identical conclusion from the evidence regarding O'Doherty's fingerprints.[32]

The United Kingdom uncovered only limited associations between the letter bombs and the revelations subsequent thereto.[33] Shane Paul O'Doherty is connected with the later events only by his fingerprints found at 40, Westridge Road. The two evidentiary blocks are separated by nearly a year of apparent inactivity on the part of the accused.[34] I find no similarity in the choice of targets nor is the method of delivery the same. Mallory cells, prominent in the testimony pertaining to the letter bombs, are mentioned nowhere else in the testimony. However, the significance of the accused's fingerprints cannot be overemphasized.

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[32] Neither O'Doherty's conviction, nor the conviction of any other alleged co-conspirator, plays any part in this Decision.

[33] The three bombing incidents described at page 23, ln. 7 *supra*, occurring on December 9th and 18th, 1974, have not been connected in any meaningful way with the alleged conspiracy and are thus irrelevant to this discussion.

[34] In *In re the Extradition of Mackin*, United States Magistrate Noami Rice Buchwald found it permissible to draw "negative inferences" from the absence of what would otherwise be considered important evidence. (*Id.* at 15-16, footnote). I agree with this conclusion and apply it here. Certainly, had better evidence been available, the requesting Party would have supplied it.

The many forensic associations made by scientific officers at RARDE lead me to find that probable cause exists to believe that there was a conspiracy to cause explosions likely to endanger human life. I find ample support in the descriptions of the Aldershot, Kings Arms and Charco-Grill devices to find that each was a bomb. The two other devices mentioned, the "Easifit", Talbot Arms bombs, were clearly just that, as the former exploded and the latter was paired with a nail bomb which did explode. (Lewis: [IV]: Sch. 6 and 3). Further, there is more than enough evidence to sustain a finding that the materials gathered at 40, Westridge Road, 39, Fairholme Road, 14, Oxford Road, 99, Milton Grove and 61, Crouch Hill, were assembled for the purpose of constructing explosive devices.[35]

From the wide-ranging concordance of design and construction of the Kings Arms and Aldershot devices, there is probable cause to believe that the two devices were built or designed by the same persons or persons. This conclusion is fortified by the closeness in time, and by the fact that both contained the fingerprints of Gilhooley in contact with the timing mechanisms. Aldershot and Kings Arms are similarly tied by more than mere coincidence to the bomb facility at 40, Westridge Road.

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[35] I reiterate that nothing contained herein as a judgment of the guilt or innocence of the persons involved. *Jhirad v. Ferrandina, supra,* nor findings of fact in the traditional sense. *Caplan v. Vokes, supra,* 649 F.2d 1342 n.10. Results of scientific comparison, e.g. fingerprints, chemical composition and mechanical fits are accepted as true. Deductive analyses removed from forensic comparison were accorded only such weight as could be supported by the scientific evidence.

Though this Court cannot, from the fingerprint evidence presented, definitely find that O'Connell and company were residents of the all-important Westridge Road bomb factory, the association proven by their fingerprints is strengthened and its quality demonstrated by virtue of the fact that the weapons used by known occupants of the flat, McCartney and Walsh, were later found at 22B, Balcombe Street following the "siege." Moreover, the nearly complete congruity of evidence seized at 14, Oxford Road with every other bomb and bomb factory, together with the fingerprint evidence, suggests a continuous and illegal association. (See Exhibits 447-452). Events leading to the capture of O'Connell, Butler, Duggan and Doherty are merely frosting on the cake.

Patently, the United Kingdom's evidence "blocks out" the elements of a conspiracy to cause explosions likely to kill, injure or cause serious damage to property contrary to Section 3(1) of the Explosive Substances Act, 1883, and Sections I and 5(6) of the Criminal Law Act, 1977. Therefore, there is probable cause to believe that there was an extraditable offense.

The evidence similarly "blocks out" a conspiracy to mail injurious articles, Title 18, United States Code, Section 1716(h), in violation of the federal conspiracy statute, Title 18, United States Code, Section 371. Further, there is probable cause to believe that a conspiracy, the conduct of which involved bombings unlawful under California Penal Code (C.P.C.) Section 12310(b), was organized in violation of California Penal Code (C.P.C.) Section 182. Each of these crimes is a felony.

I find probable cause to believe that Quinn was a member of the conspiracy based primarily upon fingerprint evidence. His fingerprints were found on items within the flat at 39, Fairholme Road signifying actual occupation or residence in the flat. The presence of detonator wire and insulation offcuts, the modified clothes peg - dowel rod combinations, nitroglycerine contamination and Smith's combat watches provides probable cause to believe that the flat was actually used to construct bombs. Quinn's actions on Fairholme Road and Charleville Road belie a guilty knowledge of the goings-on in the flat. His fingerprints on the newspaper used a packing in Charco-Grill bomb alongside those of his alleged co-conspirators evidence his continuous and close association between December, 1974 and late February, 1975. The fact that Quinn's fingerprints were found on items in two locations, Crouch Hill and Oxford Road, let after his incarceration in the Republic of Ireland, is probative of the degree of his involvement in the conspiracy. First, his fingerprints were found on a number of items relevant to the selection of targets. That two of these were carried by members of the conspiracy to places Quinn had never been suggests that otherwise innocuous tourist or traveler's aids were of some importance.

The evidence, as summarized, reveals more than the "slight connection" required under domestic federal law, *United States v. Kenney,* 645 F.2d 1323, 1335 (9th Cir., 1981); and a "meeting of the minds" beyond "mere association." *United States v. Beecroft,* 608 F.2d 753 (9th Cir., 1979).

In sum, the totality of the evidence presented by the requesting party convinces the Court that there is probable cause to believe that Quinn was a member and participant

in the conspiracy as alleged in Charge Eight (8) of the request of extradition, and that such request should be granted.

THE STATUTE OF LIMITATIONS IN RE THE CONSPIRACY CHARGE

A. ISSUANCE OF THE ARREST WARRANT IN THE UNITED KINGDOM

Article V(1) (b) of the Treaty between the United Kingdom and the United States provides that an accused may not be extradited on any charge for which "prosecution . . . has become barred by a lapse of time according to the laws of the requesting or requested party." The United Kingdom imposes no period of limitations on prosecutions for either of the offenses for which extradition is sought. The United States imposes no period of limitations on capital offenses, such as murder. Title 18, United States Code, Section 3281. Under the law of the United States, the statute of limitations applicable to the conspiracy charge is found in Title 18, United States Code, Section 3282, which provides:

> § 3282. *Offenses not capital.*
>
> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information instituted within five years next after such offense shall have been committed.

See: *Caplan v. Vokes, supra; Jhirad v. Ferrandina, supra.*

The request for extradition recites that Quinn's involvement in the alleged conspiracy terminated on April 3,

1975, which not coincidentally is the date Quinn was arrested in the Republic of Ireland. Quinn contends that his extradition on the conspiracy charge is barred for lack of prosecution within the period of limitations under Section 3282.

The United Kingdom took the position that the "laying of an information" and simultaneous issuance of an arrest warrant on July 16, 1976, by a Bow Street Magistrate tolled the statute in the same manner as an indictment under United States Federal criminal law and procedure.[36] Initially, this contention was based upon the passing reference by the Ninth Circuit, in *Caplan v. Vokes, supra,* to just such a warrant:

> "The relevant statute of limitations appears in 18 U.S.C. § 3282, which bars most non-capital prosecutions where charges have not been brought within five years. (Citation omitted). *Measuring from the date of the London arrest warrant,* May 18, 1978, we are concerned with charges involving acts prior to May 18, 1973." *Id.* at 1340. [Emphasis added].

Upon a cursory reading, the underscored passage might lend some measure of support to the government's contention. However, the effect of the Magistrate's warrant was not an issue before the Court in *Caplan,* nor was it argued or briefed. (See Declaration of Lawrence A. Callaghan, dated December 16, 1981). The Court's reference to the warrant appears to have been merely one of convenience.

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[36] A second warrant of arrest, dated September 4, 1979, charged Quinn with both the murder of Constable Tibble and the conspiracy. The arrest warrant was issued as part of an effort to obtain Quinn's provisional arrest in the Republic of Ireland preparatory to the commencement of extradition proceedings. (Lewis [III]: Exhibit 'D').

Nonetheless, the United Kingdom urged that as a matter of first impression, this Court should find that the Bow Street warrant tolled the statute of limitations under the rubric of the "liberal interpretation" to be accorded international compacts of this type. Cf. Factor v. Laubenheimer, 290 U.S., 293, 294. Distilled to its essence, the United Kingdom seeks to have this Court paraphrase the treaty in a manner to avoid what is in essence a "loophole" which the drafters failed to perceive or with which they were unconcerned.

The problem here arises from a difference between the criminal procedures of both contracting parties, the laws of which must both be satisfied or complied with under the Treaty's provisions before extradition can be accomplished.

In practice, the present judicial system in Great Britain functions, for the most part, on a committal proceeding much the same, for example, as the State of California's criminal courts. Prior to 1933 there were in Great Britain grand juries functioning with the same capacity and effect as do grand juries presently functioning under the federal laws of the United States. In 1933 the Administration of Justice Act, abolished the English grand jury system in favor of the present committal proceedings. However, in passing it should be noted that there has been retained in that present system a procedure which is used on rare occasion whereby the prosecution makes an *ex parte* application to the Court for an "indictment". (See: Further Declaration of Peter W. Murphy, January 6, 1982, pp. 2-3). This Court has received testimony that such an *ex parte* "indictment" in Great Britain is in practice rarely sought in an instance where the suspect remains at large as a fugitive and has not been before the Court. On balance, this Court also heard testimony that there is no procedural prohibition

against seeking such an indictment under such circumstances. The government in this case attempts to avoid or circumvent the impact of the clear meaning and intention of the requirement of an indictment (or its functional equivalent) as prescribed under the laws of the United States in order to toll the statute of limitations. The government argues that a formal charge by way of "indictment" is not a necessary predicate to a request for extradition and that Title 18, United States Code, Section 3184, provides in pertinent part:

> "Whenever there is a treaty . . . for extradition between the United States and any foreign government . . . a court of the United States . . ., may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty, issue his warrant for the apprehension of the person so charged, that he may be brought before such . . . magistrate, to the end that the evidence of criminality may be heard and considered . . . ."

(See, e.g. *Grin v. Shine*, 187 U.S. 181 (1902); *Ex Parte Davis*,, 54 F.2d, 723 (9th Cir., 1931); *Matter of Assarson*, 635 F.2d, 1237, 1242-44 (7th Cir., 1980).

The words "complaint" and "charging" as utilized in Section 3184 are general terms admitting of many and varying interpretations any of which may attend any request for extradition from any country without reference to the specific provisions, requirements or limitations of the actual treaties of extradition themselves. In no way or manner can such general words be engrafted upon or into any such treaty to avoid or circumvent the application or impact of specific requirements or provisions contained in such

treaties or other applicable statutes having specific impact upon said said treaty provisions.

Title 18, United States Code, Section 3282 (to which the Treaty herein indisputably refers) with equivocation provides that the statute of limitations can only be tolled in a felony case in the courts of the United States if an indictment is brought (unless waived by the defendant). The filing of a complaint and the issuance of an arrest warrant will not satisfy or supplant the requirement of an indictment.

This Court is well-aware of its responsibility under international law and comity to interpret the Treaty in accordance with the express or apparent intent of the parties, and of its further responsibility to reject defenses which "savor of technicality." *Bingham v. Bradley*, 241 U.S. 511, 517 (1915). However, comity should not serve as a judicial license for this Court to deny an important right of the accused by plugging a "loophole" in the Treaty provision to which both of the contracting parties knowingly entered into. Identical provisions applying both the prescriptive statutes of the requesting and requested country exist other treaties between the United States and other nations, including among others, Brazil, Sweden and Israel. The wisdom and complications that can occur by including and applying the prescriptive statutes of the *requested* country in such treaties has been often criticized as theoretically and practically unsound. See, e.g. M. Whiteman, *6 Digest of International Law*, ¶ 17, pp. 859, *et seq.; Harvard Research in International Law, 29 American Journal of International Law*, 158-213.

The instant case at hand readily demonstrates a practicable complication arising from the requirement of satis-

fying the statutes of the requested party. However, responsibility in that area must be addressed to the Executive and not the Judiciary.

In contrast, the Ninth Circuit has found, as a rule of interpretation, that statutes of limitations contained in extradition treaties, "no less than found in domestic law, represent an important right of the accused" and must, therefore, be "liberally interpreted in favor of repose." *Caplan v. Vokes, supra*, 649, F.2d at 1341 n.7.

In short, this Court declines the government's invitation to rewrite the terms of the Treaty and statute where Congress has not. While probably not unwarranted, such a revision is beyond the power of this Court to effect. *Valentine v. United States ex rel Neidecker*, 299 U.S. 5 (1936); *Lattimer v. Poteet*, 39 U.S. 328, 333. Under the terms of the Treaty and the referenced provision of United States law, only the finding of an indictment tolls the statute of limitations. *Powell v. United States*, 352 F.2d 705 (D.C. Cir., 1965) (arrest does not toll statute of limitations); *Ex Parte Lacy*, 37 Pac. 1095 (1894) (filing of an information does not toll statute of limitations in felony prosecution); *United States v. Slacum*, 27 Fed.Cas. 1124, Case No. 16, 311 (1 Branch C.C. 485, 1808) (presentment of an indictment not tantamount to finding an indictment for purposes of tolling the statute of limitations).

The English information-arrest warrant procedure is equivalent for these purposes to the complaint-arrest warrant procedure under domestic law, but is not the functional equivalent of our indictment. Therefore, in accordance with the mandates of Article V(1)(b), the statute of limitations of the requested party was not tolled merely by the "laying of the information" in 1976.

B. FLIGHT OF THE ACCUSED.

Notwithstanding the foregoing discussion concerning the "laying of the information" and for the reasons hereafter set forth, the Court finds that the statute of limitations was nonetheless tolled by virtue of the accused's flight from justice in 1975 when he departed the United Kingdom after the Tibble murder.

This case was initiated in this Court upon a request for provisional arrest pursuant to Article VIII (1) of the Treaty, which applies only to "urgent cases". The Court granted such request, which by implication, constituted a threshold finding by the Court that flight had occurred. Shortly thereafter, the matter came on for a bail hearing and the government opposed release of the accused on bail, arguing among other things, that Quinn was a "low profile individual" and that he had in the past used alias and was conceivably a flight risk. (RT, October 6, 1981, pp. 27-28). Thereupon, the Court declined to admit Quinn to bail.

Subsequently, the case came before the Court for various matters, including arguments and the scheduling of the taking of testimony and evidence. On that occasion, the government indicated, for reasons not stated, that it would not introduce evidence on the issue of flight, even though this Court had previously noted the probable implication of the fugitive statute, Title 18, United States Code, Section 3290 (RT, October 6, 1981, p. 9), which provides, "No statute of limitations shall extend to any person fleeing from justice."

Notwithstanding the Government's procedural posturing on whether it would or would not offer evidence on

"flight," this Court in fulfillment of its mandate and obligations, ordered *sua sponte* on January 30, 1982, that the parties address the issue as to whether the accused fled from justice thereby tolling the statute of limitations by virtue of Title 18, United States Code, Section 3290.

In *United States v. Wazney*, 529 F.2d 1287, 1289, (9th Cir., 1976) it was held in an extradition case that:

> "[I]n order to establish that an accused was fleeing from justice within the meaning of section 3290, the prosecution must meet the burden of proving [by a preponderance of the evidence] that the accused concealed himself with the intent to avoid arrest or prosecution."

See also, *Caplan v. Vokes*, *supra*, 649 F.2d at 1341.

At the outset it should be noted that it is obvious that an accused may be found to have fled justice within the meaning of Section 3290 despite the lack of any sort of formal charge having been made against him at the time of actual flight. *Streep v. United States*, 160 U.S. 128 at pp. 133-34 (1895); *United States v. Ballesteros-Cordova*, 568 F.2d 1321, 1323 (9th Cir., 1978). When an accused flees from justice the government "is not required to file an indictment or even to issue an arrest warrant." *United States v. Gonsalves*, slip op. 81-1214, n.5 (citing *United States v. Ballesteros-Cordova*, *supra*). In its most recent statement concerning the statute of limitations, the Ninth Circuit wrote:

> "The purpose of the statute of limitations is to balance the government's need for sufficient time to discover and investigate the crime against the defendant's right to avoid perpetual jeopardy for offenses committed in the distant past. *United States v. DiSantillo*, 615 F.2d 128, 135 (3rd Cir., 1980); See *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 859-60, 25 L.Ed.2d

> 156 (1970). Congress has determined that when the accused in a criminal prosecution is purposely delaying prosecution by 'fleeing from justice', the balance tips in favor of the government's need to investigate the crime, and the accused should be denied the benefits of the statute of limitations. See 104 U.Pa.L.Rev. 1111, 1113 (1956)."

Id. "Moreover, the prosecution need only prove that the defendant knew he was wanted by the police and that he failed to submit to arrest." *United States v. Ballesteros-Cordova, supra,* at 1323; *United States v. Wazney, supra.*

Viewing the evidence presented this Court by the United Kingdom in support of Quinn's requested extradition, the Court finds that the preponderance of such evidence convinces it that Quinn fled from justice of the United Kingdom with the intent to avoid arrest and/or prosecution for any one or all of three possible offenses.

The basis for this Court's finding "intent to flee" rests upon the fact that Quinn, while carrying an illegal and concealed weapon and using the alias "Roberts", ran from the grasp of an identified police officer rather than submit to questioning, which questioning could have resulted in discovery of the illegal weapon and his possible connection with an illegal bomb factory, either of which discoveries could have resulted in his immediate arrest and the potential prosecution. Then, in the moments immediately following his confrontation with the uniformed officer, he continued to avoid arrest by murdering Officer Tibble who was blocking his path of flight, thereby committing a further crime which could, and undoubtedly would have resulted in his immediate arrest and prosecution had he not then been successful in his flight. Some five weeks thereafter, Quinn "surfaced" in the Republic of Ireland where he was

arrested and then ultimately imprisoned for being a member of the I.R.A. Accordingly, this Court finds that the preponderance of the evidence clearly and unequivocally establishes that on the day of the Tibble murder, Quinn fled the justice of the United Kingdom for the specific purpose of avoiding arrest and prosecution on any or all of several criminal offenses and that he thereafter absented and concealed himself from such authority by travelling first to the Republic of Ireland and eventually to the United States.

Quinn urges, however, that at some point in time he regained the benefit of the running of the statute of limitations by reason of the fact that the United Kingdom eventually discovered his whereabouts in the Republic of Ireland and also later the United States, but was thereafter dilatory in promptly seeking his extradition. He further asserts that his open return to the United States and living openly under his true name is demonstrable evidence that he was not fleeing justice and should further afford him the benefit of the resumption of the running of the statute of limitations, again by reason of the dilatory efforts of the United Kingdom in seeking his extradition at a time when they knew, *or could have known and determined his whereabouts.*

This Court rejects each of these several contentions of Quinn and finds that from the date that Quinn fled from the scene of the Tibble murder to the present, he has been a fugitive from justice within the meaning of Title 18, United States Code, Section 3290.

In regard to his sojourn to the Republic of Ireland following the events in Great Britain which culminated in the Tibble murder, it has been asserted that Quinn lived

openly under his true name, thereby diffusing any legal presumption or finding that he was attempting to conceal himself from being arrested, prosecuted or apprehended by the authorities in the United Kingdom. This broad assertion is simply not supported by the evidence and facts presented to this Court. When Quinn absented himself from Great Britain and travelled to the Republic of Ireland, he did not pass through immigration controls. When he was thereafter arrested on April 3, 1975, by An Garda Siochana in the company of one Margaret McKearney, both were using false names. [I]t was not until some two and one-half months after that event that Officer Blackledge actually travelled to the Republic of Ireland and—*unknown to Quinn*—identified Quinn as the Tibble murderer.

Thereafter, Quinn remained imprisoned in the Republic of Ireland until released on January 2, 1976, of which the British authorities were informed. Shortly after Quinn's release, the Garda maintained surveillance of Quinn, stopping him twice, in a ten day period, while in the company of his brother, during which time he was using his true name. However, it was subsequently established that approximately a year later, on February 9, 1977, Quinn had taken up residence in Dublin under an alias of "Owen Keenan."

Thereafter, inquiries by the United Kingdom and information provided to them by the authorities of the Republic of Ireland and the United States was uncertain and unverified as to the whereabouts of Quinn and as to whether in fact he had, and if so, when, departed the Republic of Ireland and returned to the United States or elsewhere.

Eventually, his return to the United States having been verified, the request for extradition ensued and, as indicated, he was arrested on September 30, 1981.

Upon re-entry to the United States from the Republic of Ireland, and prior to his arrest, Quinn returned to San Francisco, California, where he resumed residence under his true name, obtained employment in a family business and went about conducting his affairs in a manner and routine consistent with meeting the necessities and requirements necessary to function in society, i.e., he applied for a driver's license in his true name, as well as a social security account number incident to his employment.

There is no evidence whatsoever before this Court 1) that Quinn ever returned and lived openly in the United Kingdom between the time of his release from imprisonment in the Republic of Ireland, and 2) that Quinn was ever aware until the moment of his arrest on September 30, 1981, in Daly City that he had been identified by an eyewitness as the murderer of Tibble and that his true name was known to the authorities of the United Kingdom. Nor was Quinn aware until that time that he had been connected with the bomb factories and bombings.

This Court finds that since exiting the United Kingdom following the Tibble murder, Quinn has not regained the benefit of the running of the statute of limitations. For the reasons set forth above regarding his use of aliases upon his entry and stay in the Republic of Ireland, it is obvious that he was attempting to conceal his identity and presence from law enforcement agencies of any nation.

The Court further finds that his open return and abode in the United States in and of itself likewise did not,

under the circumstances of his case, regain him the benefit of the statute running. Under the case law, merely using one's own name does not rebut a finding of flight. See, e.g. *Jhirad v. Ferrandina, supra.* In Quinn's case, as noted above, there is no evidence of knowledge on his part that he had been identified and/or implicated in the events in the United Kingdom.

The cases cited to the Court in support of Quinn's contentions are not factually analogous to the circumstances of the Quinn affair.

He did not return to the Country where the offense was committed to live openly for the full period of limitations. See *United States v. Parrino,* 180 F.2d 613 (2nd Cir., 1950). Neither did he attempt to turn himself in. *United States v. Gonsalves, supra, Caplan v. Vokes, supra,* is of no help to the accused as there is no evidence that Quinn moved openly from the jurisdiction where the offenses were committed. See *Caplan v. Vokes, supra,* 649 U.S. at 1341 (quoting *United States v. Wazney, supra,* at 529 F.2d at 1289). This Court therefore finds by a *clear preponderance* of the evidence that the statute of limitations, Title 18, United States Code, Section 3282, was tolled by Quinn's intentional flight, from February 26, 1975, through the present. Title 18, United States Code, Section 3290. See also *Greene v. United States,* 140 F. 803 (S.D. Ga., 1906), *aff'd* 154 F. 401 (5th Cir., 1907) (accused's battle against extradition tolls the statute of limitations); and *Jhirad v. Ferrandina, supra,* 536 F.2d at 1183 (discussion of "constructive flight" supports *Greene* analyses).

The Court rejects the contention or suggestion that Quinn regained in some measure the benefit of the statute

of limitations by reason of alleged the dilatory efforts in the location and subsequent request for Quinn's extradition by the United Kingdom. Certainly, at no time after the Tibble murder did Quinn ever return to Great Britain and live openly in his own name. Insofar as his residing in and about the Republic of Ireland and later the United States, the United Kingdom could not on their own authority conducted an independent investigation within the borders of either of those sovereign nations, and was forced to rely upon the information, such as it was or might be, by the domestic agencies of those two nations.

Any deficiencies or inaccuracies supplied by those domestic agencies to the United Kingdom which contributed to a delay in the initiation of the request for extradition cannot be contributed to the United Kingdom to the extent that by reason thereof Quinn regained the benefit of the running of the statute of limitations with respect to the conspiracy charge.

Accordingly, for the reasons set forth above, the Court holds that the request for extradition, and the certification of extradition to the Secretary of State filed concurrently with this Decision, were timely filed. See *Matter of Assarsson* 670 F.2d 722, 725-26 (7th Cir., 1982).

THE POLITICAL OFFENSE EXEMPTION

Continuing a long tradition in extradition treaties, [37] the current Anglo-American Treaty excepts from extradition persons charged with "political offenses." Article V(1)(c) provides:

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[37] Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1322; Clark, *Political Offenses in Extradition: Time for Judicial Abstentionism, 5 Hastings Int'l and Comp.L.Rev. 131,* 132-33 (1981).

(1) Extradition shall not be granted if:

• • •

(c) (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or

(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.

Subparts (i) and (ii) present distinct defenses, the first addressed to the offense itself, and the second addressed to the motives of the requesting Party in seeking extradition. The Government asserted that this Court had no jurisdiction to hear evidence on either such issue; the accused claimed both were within the Court's domain under Section 3184. Motion to Dismiss, January 28, 1982, ppg. 85-86. This Court will treat the jurisdictional issues first.

A. THE UNITED KINGDOM'S MOTION IN LIMINE.

The Government based its argument upon the jurisdictional provision of the United States Code, Section 3184, which provides that the accused "may be brought before the . . . magistrate, to the end that evidence of criminality may be heard and considered." (Memorandum, Dec. 3, 1981, p.5). It was further argued as a matter of treaty construction that the language "regarded by the requested Party" indicates an intent on the part of the drafters to refer this decision to the Executive Branch. (Memorandum, Dec. 3, 1981, p. 10). Finally, it was contended that the political offense exception presents non-justiciable "political questions" appropriately resolved in the first instance by the Executive Branch. (Memorandum, Dec. 3, 1981, p. 14).

Each of these arguments was addressed and rejected in *Matter of Mackin*, 668 F.2d 122, 132-37 (2nd Cir., 1981) and in *Abu Eain v. Wilkes*, 641 F.2d 505, 512-18 (7th Cir., 1981). It should be emphasized that the Second Circuit in *Matter of Mackin, supra*, was faced with virtually identical arguments under the same treaty provision. While neither decision is binding on this Court, this Court finds the reasoning in each persuasive, and for that reason need not repeat them here.[38]

B. ARTICLE V(1)(c)(ii)

In his opening brief on the political offense exemption, Quinn argued that Article V(1)(c)(ii), providing that extradition must be denied if the accused proves that extradition has been sought "with a view to try or punish him for an offense of a political character" is within the purview of this Court. Traditionally, provisions of this type have been examined in the sense that the requested extradition is a "subterfuge" to regain jurisdiction over the accused.[39] Courts have uniformly declined to examine the motives of the requesting country, leaving that determination to the Executive Branch. See *Abu Eain v. Wilkes, supra*, at 518; and cases cited therein.[40] Just as the language of subpart (i) cannot support a finding that Congress' intent was to

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[38] It is not without significance that there is presently proposed legislation pending before the United States Congress which is being supported by the Executive Branch which would remove such jurisdiction from the Judiciary and vested it in the Executive Branch (i.e., the State Department) in future extradition cases.

[39] S.Lubet & M. Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 Journal of Crim. L. & Criminology, 193, 203 (1980).

[40] Lubet & Czackes, *supra* at n.2.

alter the traditional practice by denying courts jurisdiction over the political offense exemption, neither can the language of subpart (ii) be read to enlarge the courts' jurisdiction to inquire into the sensitive issue of a sovereign nation's motivation.

C. ARTICLE V(2)

Under the Treaty, extradition may be denied pursuant to Article V(2) "on any ground . . . which is specified by the law of the requested Party." Quinn asserts that this Article mandates an examination by this Court of the prohibition against cruel and unusual punishment contained in the Eighth Amendment, Article 5 of the Universal Declaration of Human Rights, and Article XXV of the Universal Declaration of Human Rights. This Court denies these contentions for lack of jurisdiction. It is the sole province of the executive to determine whether a foreign nation can live up to its international obligations. See e.g. *Peroff v. Hylton, supra,* 542 F.2d 1247. Moreover, there is no case authority which makes these provisions "self-executing."

The accused alleges that he cannot be extradited on the basis of the political offense exception, Article V(1)(c)(i). It is conceded that the offenses charged do not fall within the rubric of "purely political offenses" which are definitionally limited to treason, sedition and espionage. Lubet & Czackes, *supra,* at 200.

Thus, the Court's analysis is limited to the category of "relative political offenses", or common law crimes which are characterized by a political act. See Lubet & Czackes, *supra,* at 200. The elements of this defense were first set

forth in an English case, *In re Castioni*, [1891], 1 Q.B. 149, in which the British Court was faced with a construction with the Extradition Act, 1870:

> The question really is, whether upon the facts it is clear that the [accused] was acting as one of a number of persons engaged in acts of violence with a political objective, and as part of the political movement and rising in which [the accused] was taking part.

Accordingly, there must be shown a "political rising" *Id.* at 156, and further that the offense was committed "in the course of or furthering of civil war, insurrection, or political commotion . . . ." Id. at 166.

The *Castioni* test was first recognized in this country by the district court in *In re Ezeta*, 62 F. 972 (N.D. Cal., 1894). The *Castioni* test was adopted as the law of this Circuit in *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir., 1958), *vacated and remanded*, 355 U.S. 393 (1958), *on remand* 170 F.Supp. 383 (1959). In fact, "[a]merican courts have uniformly construed 'political offense' to mean those that are incidental to severe political disturbances such as war, revolution and rebellion." *Sindona v. Grant*, 619 F.2d 167, 173 (2nd Cir., 1980); citing *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir., 1971), *cert. denied*, 405 U.S. 989 (1972); *Jimenez v. Aristeguieta*, 311 F.2d 547, 560 (5th Cir., 1962) *cert. denied* 373 U.S. 914 (1963); and *In re Ezeta*, 62 F. 972, 977-1002 (N.D. Cal.. 1894). See also *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir., 1980); *Eain v. Wilkes, supra*; *Matter of Mackin, supra.*

The courts of the United States have thus far declined to modify the elements in the manner engaged in by English courts, which may look to the motivation of the offender and on occasion relax the requirement of a "severe political

disturbance." See e.g. *Ex Parte Kolczynski*, [1955], 1 Q.B. 540. Though recognizing the flexibility of the test, see *Eain v. Wilkes, supra* at 519, American courts will examine neither the motives of the requesting country in seeking extradition nor of the accused in committing the offenses for which extradition is sought. *Eain v. Wilkes, supra,* at 519; Lubet & Czackes, *supra,* at 203.

Magistrate Buchwald, in *In re Requested Extradition of Desmond Mackin,* Mag. op. *Supra,* at p. 47, clearly distilled the elements of the defense; this Court will structure its discussion accordingly:

(1) Whether there was a war, rebellion, revolution or political uprising at the time and place of the offenses;

(2) Whether Quinn was a member of the uprising group; and

(3) Whether the offenses for which extradition is sought were "incidental to" and "in furtherance of" the political uprising.

The political character of the offenses is "a question of mixed law and fact, but chiefly of fact." *Ornelas v. Ruiz,* 161 U.S. 502, 509 (1896); *United States v. Artukovic, supra,* 170 F.Supp. at 393 (S.D. Cal., 1959).

No Appellate Court has yet held what the burden of proof should be and where it should be placed. As the defense is wholly collateral to the offense charged, the initial burden must be upon the accused. Secondly, the policy of comity and international cooperation require that the ultimate burden of persuasion also be placed upon the accused. As this is not the type of proceeding where the "reasonable-doubt" standard has much, if any place, the

Court holds that the burden of persuasion is by a preponderance of the evidence.

In so holding, the Court again finds itself in agreement with Magistrate Buchwald's well-reasoned opinion and the analysis of the authors in "The Role of the American Judiciary in the Extradition of Political Terrorists." Lubert & Czackes, *supra*, at 208-10; *Extradition of Mackin*, *supra*, Mag. Op. at 43-47.

Though the accused bears the burden of proof in regard to the "political offense" defense, he is not required to neither admit the offenses charged or to testify, in order to assert or avail himself of that defense. However, as a practical matter, such evidence on that absence thereof, when considered in light of all the other evidence, may be pivotal as to the Court's determination as to the preponderance of the evidence on that issue.

(1) EXISTENCE OF WAR, REBELLION, REVOLUTION OR POLITICAY UPRISING.

Evidence offered by the accused in support of his contention that there was a state of severe violent political unrest took two distinct forms. Testimony by defense witnesses went directly to prove the level of violence, e.g. the number of deaths, and further attempted to demonstrate that the current state of unrest in Northern Ireland is the product of a long history of rebellion against the British Crown. Secondly, the degree of severity of the insurrectionary activity was approached indirectly by proof concerning governmental responses to terrorist activities. The Court was also apprised that two magistrates sitting in extradition cases have found the requisite degree of violent political upheaval regarding the conflict in North-

ern Ireland to qualify under the American test. See *Extradition of McMullen*, Magistrate's Opinion, No. 3-78-1099-MG (N.D., Cal., 1979),[41] *Extradition of Mackin, supra.*

J. Bowyer Bell[42] testified that the current Irish nationalist movement and the means employed to gain that objective may be traced to "the confluence of ideas of the French Revolution and Irish nationalism." The first "rising" against British rule took place in 1778 under the leadership of Wolfe Tone. Wolfe Tone first established the ideological principles marking the present Republican[43] movement. (RT: 19-20).[44] The tradition of "physical force," an Irish epithet for violence, had its beginnings in Wolfe Tone's day. The rising led by Wolfe Tone, like

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[41] In *McMullen,* Magistrate Woelflen apparently found that the British government's derogations from certain treaties, discussed below, constituted an "admission" that there existed a sufficient insurrection to qualify under the first prerequisite for the defense. *Id.* at pp. 3-4. It further appears that the Magistrate took judicial notice of the level and type of violence occurring in Northern Ireland in 1970-1974. *Id.* at p. 4. See Lubet & Czackes, *supra,* at 193.

[42] J. Bowyer Bell is currently president of the International Analysis Center, Inc., a consulting firm concerned with political violence. A major portion of his past fifteen (15) years were spent studying the violence in Ireland. His research included interviews with the past and present members of the I.R.A. and a review of the media reports. Bell was proffered and accepted by the Court as an expert witness. (RT: 10-19).

[43] The Court adopts, for purposes of this Decision, the convention used by Mr. Holland, (see footnote 4, *infra).* Therefore, using the term Republican, as a proper noun, refers to the organized republican movement, e.g. the I.R.A., while "republican" refers to the entire group of nationalist Irish not affiliated with the military or organized groups.

[44] References in the text to "RT", unless otherwise noted, are references to the Report's Transcript of the proceedings on March 22, 23 and 24, 1982.

similar risings in 1848, 1849 and 1867, failed to achieve its goal of independence. The year 1849 is important because it was during that year the Irish Republican Brotherhood was formed in the United States by Irish expatriots. The Irish Republican Brotherhood was the immediate ancestor of what is now the Irish Republican Army. (RT: 20-21). By the end of the century, many republicans had left the physical force tradition because conditions had been improved by other means. (RT: 21).

Free elections were held in Ireland in 1918, establishing the first "Dail" or parliament. The years 1918-1922, brought several significant developments. In addition to convening the first Dail, the British government partitioned Ireland into its current divided configuration. To effectuate that legislation, the first Anglo-Irish Treaty was negotiated and legislative power over what is now the Republic of Ireland was passed to the Dail. Among those who participated in the negotiations were members of the Sinn Fein. A parliament was set up in Stormont to govern the six Northern counties now comprising Northern Ireland, formerly part of the traditional nine-county province of Ulster. (RT: 22, 23, 25-26, 67-68). The partition, of course, did not appease all of the Irish people. Those who opposed the British resolution retained the Irish Republican Army organization and, led by Eamon DeValera, rose in violent opposition to the new state. DeValera later ended the civil war by calling upon the I.R.A. to lay down its arms. (RT: 23, 69).

After 1923 and until the 1930's the situation lay essentially dormant at least insofar as IRA-inspired activities were concerned. In or around 1938-39, the Republican movement again focused its attention on the British pres-

ence in Ireland, conducting a bombing campaign along the North-South border as well as in London. (RT: 23). Between the "declaration of war" in December, 1938, and the end of the campaign, 127 "terrorist outrages" occurred, described by a defense witness as being insufficient to cause any serious disruption. The so-called "S-Plan" under which the campaign was conducted, was further characterized as "an exercise in optimism" and its chances of success termed "fanciful." The attacks were certainly ineffectual. There was minimal thought of the political implications. (RT: 70-77). By 1941, in the words of Mr. Bell, the I.R.A. was "moribund," and remained so until the mid 1940's. (RT: 24).

Following the reorganization of the I.R.A. in the mid-1940's, a campaign of sorts was conducted in Northern Ireland, continuing until the 1950's. (RT: 24). As of 1962 the movement had once again played itself out and was in disarray. (RT: 24, 78-79). In popular elections held in 1961 in Ireland, the Sinn Fein candidates polled a dismal 3% of the vote. (RT: 80, 296).[45] Holland testified that the 1939-41 campaign was more limited than Bell had reported; a "mere" 30-40 bombs were set off in the 1939-41 campaign. (RT: 291). In the later campaign, during the mid-1940's to mid-1950's, approximately 120 bombs were detonated. (RT: 295-96). By 1961, Catholic support for the I.R.A. tactics had severely diminished. (RT: 296).

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[45] Edward Jack Holland, whose testimony was probative on this point, is an Irish Journalist with family ties to both the predominantly loyalist Protestant religion and to the nationalist-dominated Catholic religion. He has written books on both the loyalist and nationalist/republican paramilitary groups. (RT: 230-31).

A new wave of violence began in the late 1960's (RT: 27). The new republicans viewed the Stormont Parliament with distrist over the allocation of government-conferred benefits to loyalist factions. (RT: 27-28). During that period, the Sinn Fein and I.R.A. supported civil disobedience movements as a protest to the perceived injustices. (RT: 29). The Provisional Irish Republican Army [hereinafter PIRA] came into existence in December 1969 as a splinter from the I.R.A. (RT: 234). The two factions were split on the issue of action: The PIRA advocated armed insurrection; the I.R.A., while espousing violence as a means to attain their goals, believed that civil disobedience and social protest were more appropriate for the time. The latter group became known as the Sinn Fein Workers Party, which espouses Marxist philosophy. (RT: 236, 312). The split was precipitated by anti-Catholic violence then taking place in Northern Ireland, which had begun in August of 1969. (RT: 29, 236). A "political wing" called the "Provisional Sinn Fein" was formed along much the same lines as the old Sinn Fein. The PIRA adopted the I.R.A. constitution drafted in 1922 by Frank Aiken which had served previously as the basis for the new defunct-I.R.A. The Provisional Sinn Fein, like the Official Sinn Fein, is legal in the Republic of Ireland. (RT: 29-33).

The Stormont government, in reaction to the escalating violence and the inability of the police forces to control it, requested the assistance of the British Army in 1969. There had already been a British Army presence in Northern Ireland in the form of a permanent garrison of 3,000. At peak strength the Army numbered 23,000. (RT: 238-39).

The PIRA appears to be organized along the vague lines of a "constitutional army." Yearly elections are

held to select delegates to a convention, which in turn selects the "executive." The Executive then names the Army Council, usually having eleven members, which functions as the central governing body of the PIRA. The council appoints, from its own ranks, a Chief of Staff. Under the level of Army Council, in descending rank within the hierarchy, are brigades, battalions, and companies. (RT: 30-31). The political objectives of the PIRA were set forth in a social and economic manifesto called "Eire Nua," gaelic for "New Ireland." This document reflects numerous reforms dependant upon the complete withdrawal of the British from Northern Ireland and the subsequent creation of a "Federal Ireland" composed of four legislative bodies, one for each of the traditional Irish provinces, and a central government. (RT: 242-44, Defendants Exhibit 23).

The violence which caused the influx of British troops was also in part responsible for the organization of "urban no-go" areas in the Catholic ghettos of Northern Ireland. No-go areas were policed by the I.R.A. and off-limits to the British. (RT: 65, 318).

Public support for the PIRA tactics is very small, but Holland testified that there is nevertheless a hardcore, tacit support and kind of vague sympathy for the aims of the movement which, in Holland's opinion, cannot be explained merely by the intimidation tactics used by the PIRA against witnesses and persons who refuse to assist them. Holland further testified, however, that public opinion fluctuates greatly based upon the current policies of the British and those of the PIRA. (RT: 292-94, 297-98).

In 1970-72, the PIRA conducted bombing campaigns coinciding with popular referendums. (RT: 39). A second

period of violence, discussed below, took place in 1973. (RT: 39-40). The period of time with which the Court is most concerned, however, are the years 1974-75. The campaign staged in those years was for the avowed objective, as stated by Provisional Sinn Fein vice president David O'Connell, to "bomb the British government to the bargaining table" and to force withdrawal of the British from Northern Ireland. (RT: 41, 89-90). In this, the objective differs from the earlier campaign in which no purpose was announced. In should further be noted that the 1973 campaign was not conducted in Great Britain and was, in any case, "isolated and sporadic." (RT: 90). O'Connell's announcement in early 1974 outlined the PIRA's intention to bomb or attack military, economic, political and judicial targets. (RT: 90).

Other direct evidence concerning the level and purpose of the violence in the years 1970-75 was elicited from Mr. Harvey, who testified that he resided in London during the 1974-75 bombing campaign. He testified that luggage lockers were closed and notices posted to the public regarding suspicious looking packages. (RT: 169). He further testified that no one in London was untouched by the bombings. (RT: 170). This latter statement was partially recanted on cross-examination and his statement limited to the inner-London area. Harvey did not know how many bombs were detonated within the relevant period of time, but allowed that eighty-five seemed a reasonable estimate. (RT: 206-07). He conceded that many of the bombs were very small, and that the effects of these incidents were felt primarily in the inner-London area. (RT: 208-09). He also conceded that there was no other "armed insurrection then-extant in London; that the British par-

liament and government offices continued to function and that the streets of London were not under military patrol. (RT: 209-10). The only hard evidence concerning the level of violence in Great Britain at the time these charged offenses took place is found in the evidentiary material submitted by the United Kingdom itself, and which is arguably probative here. See Affidavit of Alan R. Lewis (regarding Conspiracy to Cause Explosions) (Lewis [IV]). The Lewis [IV] Affidavit lists over fifty incidents of violence allegedly connected with the Balcombe Street Four occurring in and around London from October, 1974 through December, 1975. Quinn objected to the admission of this summary document. (Objection, filed March 18, 1982). The level of violence in Northern Ireland, as reported by Jack Holland and supported by published statistics, was indeed very high. (RT: 252-54; Defendant's Exhibit 22).

This direct evidence outlined above was supported by circumstantial evidence, consisting of the legal, judicial, political and military responses to the civil strife by the governments of Northern Ireland and Great Britain.[46]

The military responses was limited, in the view of the Court, to the violence in Northern Ireland. The British sent troops to Northern Ireland in 1969, (RT: 139-40)

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[46] Richard John Harvey, who was primarily responsible for detailing the governmental responses to terrorism is a Barrister at law admitted to practice in England. His practice has been primarily in the Crown or trial courts. Harvey is presently working in New York. He has been involved in commissions of inquiry and is familiar with the anti-terrorist legislation in England and Northern Ireland, and has interviewed members of the Sinn Fein and Provisional Sinn Fein. (RT: 126-135).

though officially the Stormont government was responsible. The army was under the ostensible control of Stormont until its dissolution in 1972. (RT: 140, 41). Counter-insurgency tactics, developed or reported by Brigadier Kitson in his famous book, "Low Intensity Conflict", written upon his return from a tour of duty as Commander in Northern Ireland, were used there. (RT: 57-58). A British Army staff survey, produced by the British military, (according to the PIRA), and stolen by the PIRA from a van in 1978, called "Document 37", was introduced into evidence. (Exhibit A) *Inter alia,* Document 37 describes the ability of the PIRA to sustain the level of violence and points to the "fact" that the members are not mere criminals. Document 37 estimates the PIRA's yearly budget at one million pounds. (RT: 60-64). Finally, the SAS or Special Air Services, a military unit organized to operate in "irregular" situations, was deployed by the British in Northern Ireland, but not in Great Britain. (RT: 110-111).

The level of violence in the United Kingdom may also be inferred from the many political responses undertaken by the British government. The probative of these was the dissolution of the Stormout Parliament and thus home rule in 1972. (RT: 140-41, 147). Other significant political actions included a derogation by Britain from its duties under Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, applicable only in "times of war or other public emergency threatening the life of the state." (RT: 150-51). Similarly, the United Kingdom derogated its obligations under portions of the International Convenant on Civil and Political

Rights, due to "organized terrorism" related to Northern Irish affairs. The portions of the convention to which the derogation applies secure the rights of life, liberty, security and fair trial, among others. (RT: 151-53).

Legal steps to control the violence began as early as 1922, when the Civil Authorities Special Powers Act was promulgated by the Irish Dail. (RT: 140). It delegated tremendous authority to the Minister of the Interior for Northern Ireland, and banned many republican displays. (RT: 141-42). The Special Powers Act provided authority for internment without trial in August, 1971. (RT: 146-47). In another step, following the dissolution of the Stormont Parliament in 1972, the British government commissioned a study by House of Lords Judge Diplock. The result of his investigation, released in December, 1972, became widely known as the "Diplock Report." (Defendant's Exhibit 9). The majority of the commission found there had been "an intimate state of emergency in Northern Ireland since it first became a separate province." (RT: 148, Ex. 9). Among the many conclusions of the report highlighted by the accused, was the determination that mostly distinguished the PIRA terrorists from other criminals. However, the report also concludes that many ordinary criminals were "inevitably" attracted into the ranks. (RT: 149-50, Ex. 9).

Following the release of the Diplock Report, the Emergency Provisions Act was enacted in August, 1973, repealing the Special Powers Act. (RT: 189, 153; Defendant's Exhibit 21 as amended in 1978). In accordance with the findings of the Diplock Report the Emergency Provisions Act abolished jury trials for certain scheduled

offenses. (RT: 153-54). Special tribunals provided for in the Act, aptly known as the Diplock Courts, apply equally to loyalist and republican activists, and have the salutary effect of reducing the chances of "perverse" verdicts common under the Rate Payer Vote-Jury selections system then in effect in Northern Ireland which had favored the loyalists. (RT: 195-97). Another provision of the Emergency Procisions [sic] Act relaxed standards of admissibility relating to confessions. (RT: 178-82). This provision opened the door for the employment as to severe methods to obtain confessions, infamously known as the "five techniques." (RT: 184-87). In an action before the European Commission of Human Rights, it was established that some detainees had been subjected to inhuman treatment at the hands of the officials in Northern Ireland. (RT: 185-86).

Internment was phased out in 1975 and has not been used since in Northern Ireland. It was never used in Great Britain. (RT: 189-90). "Special category status," akin to prisoner of war treatment, was granted political prisoners in Northern Ireland. It has since been phased out, though not retroactively. (RT: 223, 228-28, 283-85).

The political responses to terrorism in Great Britain were less pronounced. Internment was never invoked. Though a "rough" equivalent to "special category status" existed in Great Britain, its parallel was never extended to members of the PIRA. (RT: 309). Until the 1970's, the only special legislation applicable to Great Britain was the "Prevention of Violence Temporary Provisions Act," which was promulgated in response to the 1939 I.R.A. bombing campaign and was in effect only until 1954. Its purpose was to combat acts of violence designed to influence public opinion or government policy regard-

ing, *inter alia,* Northern Irish affairs. (RT: 142-44). In 1974, after the tragic bombing of a Birmingham pub killing twenty-one persons, the British Parliament enacted the Prevention of Terrorism Act in the hopes of forestalling the feared reactions of an enraged local populace. The legislation was passed in near-record time. (RT: 158-59). The Prevention of Terrorism Act, which applies to the entire United Kingdom, has four objectives: (1) to exclude from Great Britain or Northern Ireland these whom the Secretary of State is convinced are connected with terrorism, (a form of internal exile); (2) proscription of the Irish Republican and National Liberation Armies and formal support for them; (3) to extend the length of time during which police may detain suspected terrorists (five days on approval of the Secretary); and (4) to make illegal the refusal to give information regarding terrorists to the authorities. (RT: 156-61, Defendants Exhibit No. 20). The Act suspends habeus [sic] corpus rights for detainees. (RT: 160). Unlike the Emergency Provisions Act, effective only in Northern Ireland, the Prevention of Terrorism Act sets up no schedule of offenses other than the crimes of withholding information and disobeyance of exclusion orders. (RT: 198).

The United Kingdom, faced with this evidence, nevertheless argued that there was no war, rebellion, revolution or like political uprising of similar severity in and around London in the years 1974 and 1975. Were the Court's analysis so limited, it would indeed find that the severity of the political disturbance was insufficiently grave to bring into play the political offense exemption. However, in a constitutional sense Northern Ireland is a part of the United Kingdom, and offenses committed in Northern Ire-

land are offenses against the same sovereign, though the Court notes that different sets of laws apply. In Northern Ireland, before, during and after the period in question, there was what can only be described as a severe armed insurrection with a political basis. The actions of the British and Northern Irish authorities, while not in themselves dispositive, corroborate the testimony of defense witnesses and demonstrate that the violence was of such intensity that it brought down one government and forced its replacement to impose severe curbs on personal liberty. Accordingly, the Court finds a violent political uprising of sufficient magnitude to bring into play the poltical offense exception.

INVOLVEMENT OF THE ACCUSED

Mere contemporaneity of the charged offenses with the violent political uprising is insufficient to carry the accused's burden of proof. Lubet & Czackes, *supra*. There must also be a showing that the acts of violence committed were "incidental to" and in furtherance of the political cause. Predicate to any such finding there must be proof that the accused was a member of the uprising group. Apparently this determination is as far as American courts will go to determine the "motivation" of the accused.

Quinn contends he was a member of the military wing of one faction competing for control over the destiny of Northern Ireland, the PIRA. It is further contended that the acts with which Quinn is charged were part and parcel of a larger bombing campaign carried on by a PIRA Active Service Unit of which the Balcombe Street Four were also members. Taking advantage of the Court's earlier ruling, the accused did not testify.

The keystone of the accused's argument is Exhibit 1, a record of his conviction in the Republic of Ireland for membership in a proscribed organization, to wit, the I.R.A. Notably, a *nolle prosequi* was entered as to one robbery count and a not guilty verdict entered as to other offenses. (Exhibit 1). Far from being ironclad proof of membership, this evidence is hardly probative. If nothing else, the expert testimony proved a distinct difference between the Irish Republican Army and the provisionals. Moreover, as the government aptly observed, no supporting evidence appears in the exhibit. At most, it is an indication that as of April 3, 1975, Quinn was a member of a group calling itself the Irish Republican Army in the Republic or Ireland. (See Exhibit 1). Even assuming that the I.R.A. and the PIRA are the same for these purposes, mere membership in the Army, a dispersed, covert organization with little direct control over the lower reaches of its hierarchy, does not even prove that Quinn was a member of the specific group on whom the defense attempts to throw responsibility, i.e. the Active Service Unit.

The Court would not have reached this stage, of course, had it not found probable cause to believe that Quinn was a member of a conspiracy also involving the Balcombe Street Four. Said determination is not the equivalent of finding that Quinn was a member of whatever political organization, if any, to which the Balcombe Four answered. Active Service Units were groups of men, mostly from Northern Ireland, who lived apart from the Catholic community and were allegedly responsible for carrying out the violent activities of the PIRA. (RT: 43-44, 48-49). Mr. Harvey, a "second chair" in the defense of the Balcombe Street Four, testified that Mess'rs O'Connell, But-

ler, Duggan and Doherty were placed on trial for many of the same offenses as listed "in the schedule of offenses Chief Inspector Lewis prepared for this case." (RT: 162, 188). The Court assumes he intended by this reference the Affidavit denominated "Lewis [IV]". He further testified that the prosecution presented no evidence of personal motivation, instead arguing that their motivation, though political, was irrelevant. (RT: 170-71). Initially, the four were charged with 52 separate counts but the number was reduced in the indictment on which trial was had to twenty-five. (RT: 163). The case against the four was based on the theory that they were members of an Active Service Unit carrying out a number of bombing and shooting attacks. (RT: 166). The Balcombe Street Four presented no defense yet were acquitted on six of the twenty-five counts. (RT: 168-69). There is no evidence that Quinn's name arose during the trial of the Balcombe Street Four. (RT: 203).[47]

From this evidence the Court cannot say that Quinn was probably a member of the PIRA, rather than a mere hanger-on or common criminal. Though the evidence is sufficient to support a finding of probable cause to believe that Quinn conspired with his alleged co-conspirators during at least a portion of the alleged "campaign," the fact that the verifiable duration of his involvement was so

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[47] The Balcombe Street Four were prosecuted under the Prevention of Terrorism Act. Quinn was not. (RT: 199-202). In *Mackin, supra,* the court found it significant, regarding Mackin's membership in the PIRA and the "in furtherance requirement," that the accused, Desmond Mackin, had been charged in the same manner as the Balcombe Street Four. The opposite inference is not equally probative.

limited operates against a finding that he was indeed a member of the uprising group. Despite a pledge in his opening argument to offer evidence clearly proving his political affiliations, if not motivation, no such proof was forthcoming from the accused.[48] The best evidence of his membership, Quinn's own statements, were not offered. This was a tactic of the accused's own choosing. Finally, Quinn's argument that it is unreasonable to assume an American, involved in the type of acts with which he was accused, would have other than a nationalistic, patriotic intent is not viable for precisely for the reason that he was an American. There is no evidence *on the record* which would even arguably demonstrate political commitment from which such membership might be inferred. The views contained in Document 37, to the effect that the I.R.A. was not a band of mere hooligans is negated by the conclusion of the Diplock Report that any movement such as the Republican movement attracts the criminal element.

(2). "INCIDENTAL TO AND IN FURTHERANCE OF."

Though the Court's previous determination that Quinn failed to prove his membership in the uprising group disposes of his political offense exception claims, the claim is also defeated for failure of proof of the third element.

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[48] Quinn could not be prosecuted in Great Britain for membership in a proscribed organization such as the PIRA under the "specialty principle" which was expressly incorporated into the Treaty. Article XII(1). See *[E]ain v. Wilkes, supra,* at 518. Nor need he fear prosecution for political beliefs, which is precluded both by Article XII(1) and the principle of "dual criminality" Lubet & Czackes, *supra,* at p. 206.

As these latter two elements are flip sides of the same question, the Court approached this issue as equally important and dispositive. In other words, the necessity of this determination is not negated by an arbitrary ordering of the issues.

a. THE TIBBLE MURDER.

The evidence upon which the Court found probable cause to believe that Constable Tibble was murdered by the accused, established that Tibble was shot by a man coming from the area of Fairholme Road where a bomb-factory, alternatively described as a "safe-house," was subsequently uncovered. Assuming for purposes of discusion that Quinn was that person, to defeat extradition under Article V(1)(c)(i) Quinn must take out by a preponderance of the evidence that his actions that day were not only incidental to, but in furtherance of the political objectives of the uprising group. Like Magistrate Buchwald in *Mackin, supra,* though for entirely different reasons, the Court is not faced with conflicting evidence as to the events of that day.

The uncontradicted evidence shows that for all intents and purposes Tibble was nothing more than a motorcyclist who attempted to stop one man running from another. According to the defense theory, this shooting is ascribable to a fear that Tibble was an armed member of the SAS or other anti-terrorist squad, and that if caught, he would be tortured and forced to reveal the existence of the safe house. Alternatively, there was some evidence that the loss of a firearm would be considered a capital offense within the ranks of the I.R.A. (RT: 285). The evidence

offered in support of these theories can only be described as equivocal.

Bell testified that life in an Active Service Unit was isolated and tense, involving constant movement and suspicion raising to a near-paranoid state. (RT: 48-52). There was, according to Bell, a certain public hysteria in London over the bombing attacks, and the London police were "known" to be out in force. The "terrorist squad" was "known" to be armed and, at least with respect to events in Northern Ireland, the PIRA believed that plainclothes police were responsible for the murders of republicans. Moreover, there was a "feeling" that the SAS and other troops shot suspected terrorists. Bell correctly noted that Quinn made no attempt to harm the policeman until it became clear he would be searched. From this evidence, Bell concluded that Quinn fled to avoid harmful forces and to protect his Active Service Unit.

In fact, neither the SAS nor any other troops were deployed in the London area for anit-IRA activities. (RT: 110, 209). It is common knowledge in England that firearms are illegal and that as a rule the police are unarmed. (RT: 211-12). (Lewis [III]: ¶ 12). Moreover, the Tibble shooting occurred nearly one month into the final 1975 truce between I.R.A. forces and the British authorities. (RT: 267). Thus, bases for the PIRA "paranoia" were applicable more to the dangers of life in Northern Ireland than any rational fear of police in London. More importantly, none of this paranoia can be directly ascribed to Quinn, with the possible exception of the "gun protection" theory. Even accepting the theoretical applicability of the political offense exception element to such a "military"

policy, see *In re Gonzales, supra,* 217 F.Supp. 717, at 721 (S.D. N.Y., 1963), the events in this case so far remove it from the pale of reasoned conduct that the Court simply cannot find the murder of Constable Tibble to be anything other than a criminal act removed from the political aims of the uprising group and therefore outside the political offense exemption.

The safe-house protection theory cannot be sustained on the facts. In order to discourage Blackledge from further questioning of him, Quinn offered to take Blackledge and show him where he had been. Moreover, the person to shoot in such a situation, if that had been the purpose of the act, would have been Constable Blackledge who was arguably an identified member of the opposition forces. Instead, the suspect shot what appeared to be a "civilian" uninvolved with police activity. It is difficult to conceive of a way in which this action may be considered to be in furtherance of the PIRA's political goals.

Furthermore, it has not been established that the murder of Constable Tibble was incidental to the political uprising at least in the manner heretofore accepted by the courts of this Country. This case is easily distinguishable from the seminal case *In re Castioni, supra,* where the murder appeared to be almost identical in the heat of a full-scale onslaught against the local government.[49] Similarly, in *Ramos v. Diaz, supra,* the accused was charged with killing a prisoner in the final moments of a full-scale civil war. In that case the accused was in command of any

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[49] See e.g. Hannay, *International Terrorism and the Political Offense Exception to Extradition,* 18 Colu., J. Trans.Law, 381, 401-406 (1979).

army unit specifically assigned to round up opposition forces still fighting against the revolutionary government. *Id.* Though this Court views with alarm the result of that case, it is clear that the district court could properly find according to the evidence that the accused "bore no ill will or malice towards [his] victim." *Id.* at 463. Similarly, the evidence amply supports the finding of the Magistrate in *Mackin, supra,* that the accused directed his actions against a known member of the opposition force, pursuant to his responsibilities in the I.R.A. in the locale where violence was most prominent. *Id.* at 98. Accordingly, the Court finds that Quinn has failed to establish the requisite nexus between the offense and the political uprising. He therefore failed to prove his entitlement to the political offense exemption under Article V(1)(c)(i) of the Treaty.

b. THE BOMBING CONSPIRACY.

Though the offense with which Quinn is accused is conspiracy, the key element of which is an "agreement," for purposes of the political offense exception it must be viewed in light of the separate objects and/or overt acts committed in furtherance thereof. In this case, the overt acts ascribable to the conspiracy include three letter bombs and at least five other bombing incidents: the Aldershot, Kings Arms, Charco-Grill, Talbot Arms and Easifit bombs.

It is unrebutted that the avowed purpose of the Republican movement is to replace the existing Government of Northern Ireland with one more to their liking and further to effect a unification of the entire island nation. The government introduced evidence illustrating the fact that none of the "intended" victims of the letter bombs were part of

that category of targets which might be considered "military." (Lewis [IV]). The PIRA, however, did not claim that its targets were limited to "military ones." (RT: 38). In Northern Ireland, many of the targets were commercial, attacked in hopes of destroying the "artificial economy." Bell testified that in Great Britain, the primary targets were military, though when that objective was impossible, commercial targets were acceptable. (RT: 38). During the 1974-1975 campaign, the avowed goal of the PIRA was "to bomb the British to the bargaining table," (RT: 41), this according to David O'Connell. (RT: 39). Bell also testified that the PIRA might choose as targets persons they viewed as being part of the "establishment." (RT: 97).

Holland stated that the PIRA bombing campaigns were always designed to make a political point. (RT: 257). In March, 1973, for example, the "Old Bailey" was bombed to protest a popular referendum then taking place in Northern Ireland regarding the future of British control. (RT: 257). In August of the same year, bombs were detonated in London "to register the provisionals displeasure" over negotiations between the British and various Irish factions, including republicans, to establish an assembly to replace the defunct Stormont Parliament. (RT: 257-58). Campaigns in February, late summer and early fall of 1974 coincided with general elections and were intended, according to Holland, to demonstrate that the PIRA could not be ignored in any future settlement of the conflict in Northern Ireland. (RT: 258-59). Bombings during the summer of 1974, following the breakdown of the "Sunningdale" power sharing agreement, were intended to show

that a new arrangement then being developed was unacceptable to the Republicans. (RT: 258-59).

Holland testified that the campaign reached a "critical stage:" in the Autumn of 1974 when, after many injuries, then Prime Minister Harold Wilson moved to reestablish contacts with the provisionals. (RT: 260). Negotiations were conducted through an intermediary, William Arlow, who carried proposals from a December 9, 1974, PIRA conclave to Merlyn Rees, Minister of State for Northern Ireland. The proposal included demands for a long-term British commitment to withdrawal from Northern Ireland in exchange for a cessation of violence. (RT: 260-61). In reply, the British demanded an end to the violence in return for which they would consider the situation afresh. (RT: 262). These negotiations, which apparently later became direct communications, continued intermittently until July, 1976, when the British Ambassador, Ewart-Biggs, was assassinated in Dublin. (RT: 266-67). In any case, these negotiations were the product of British despair over the breakdown of the Sunningdale accord and the apparent inability of the politicians to deliver on their promises. (RT: 166). Hilland attributed the breakdown of the Sunningdale agreements to protestant factions. (RT: 259).

The negotiations produced a short-lived truce beginning December 22, 1974, and terminating on January 11, 1975, with another spate of bombings. (RT: 167, 267). That violence ended on January 27, 1975, when a second truce was reached. (RT: 267). According to Holland's unrebutted testimony, the truce(s) resulted in an agreement to phase out internment and to establish "Truce

Monitor Centers" in Northern Ireland manned by the Sinn Fein with direct links to the British administration at Stormont. (RT: 268-72). The purpose of the preceding testimony, apparently, was to prove the "legitimacy" of the Republican movement.

Notwithstanding these historical events, and the political motivations thereof, as recounted by witness Holland, the Court finds that the proof in regard to the bombings in the alleged conspiracy involving Quinn fails to establish the requisite nexus to satisfy the political offense exception.

First, this Court adopts the reasoning and holding of the Seventh Circuit in *Eain v. Wilkes, supra.* Like the situation confronting the Seventh Circuit in *Abu Eain, supra,* the facts of the instant case cannot be easily reconciled with earlier cases where the political offense exception was sustained:

> "Those cases involved on-going, organized battles between contending armies, a situation which, given the dispersed nature of the PLO, may be distinguished."

Eain v. Wilkes, supra, at 519 (citing *Ramos v. Diaz, supra; United States v. Artukovic, supra.*) Both the nature of the conflict and the character of the PIRA, like the conflict between the Palestine Liberation Organization and the State of Israel, present problems distinct from those faced in the earlier decisions:

> "An on-going, defined clash of military forces may be significant because that is one backdrop which may bring into sharp relief an individual act of violence. Once the circumstances move away from that context, the judiciary's task of determining what degree or

> type of violent disturbance permits a successful invocation of the political offense exception becomes more difficult. It also poses a different question of proof than otherwise involved."

Eain v. Wilkes, supra, at 520, citing Lubet & Czackes, *supra,* at 206, 208-10.

The *Wilkes* court held that in order for what appear to be random attacks on the civilian population to be the subject of a successful assertion of the political offense exception, there must be proved "a direct link between the perpetrator, a political organization's political goals, and the specific act." *Id.* at 521. " '[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent.' " *Id.* at 521; quoting Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare,* 10 J.Int'l Lw & Econ. 475, 501 (1975). Relying in part upon the British case *In re Meunier,* [1894] 2 Q.B. 415, the Seventh Circuit found "anarchist-like", rather than "anarchist-inspired" activities to be unprotected. *Id.* at 521-22.

Applying the *Wilkes* decision to the present case, this Court cannot but find the actions alleged against Quinn to be "anarchist-like." The letter bombs were *directed* against the innocent. The Kings Arms, Aldershot and Charco-Grill bombs were, if considered at all, directed against innocent civilians under circumstances or at a minimum where the perpetrators could not help but expect that civilians would be injured.[50] By definition, there can

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[50] Likewise, "actions aimed at disrupting various vital services, might result in mere anarchy than change of government."

(Continued on following page)

be no direct link between such actions and the political goal of the I.R.A. to force British withdrawal from Northern Ireland, as these actions neither took place in Northern Ireland nor were they directed against the government the I.R.A. was attempting to displace.[51]

The second and independent ground for denying to the accused the benefit of the political offense exception relates, again, to a failure of proof. Assuming for the moment that the *Wilkes* Court was wrong as a matter of law in differentiating offenses based upon the character of the victims, uprising and uprising organization, the Court still finds that the accused failed to demonstrate by a preponderance of the evidence that the specific overt acts with which he, through the conspiracy, is charged were in the furtherance of the political goals of the PIRA.

A defense witness, Bell, noted with respect to PIRA bombing campaigns that "in retrospect . . . they [the PIRA] have a great deal of rationalization to do." (RT: 42). He admitted that often the Active Service Units acted without guidance from within the PIRA hierarchy. Shockingly, he admitted that some of the incidents were probably "targets of opportunity" or chosen for reasons of spite or malice. (RT: 43). Jack Holland concurred in this judgment. (RT: 302-04). Prior to a reorganization of the PIRA

(Continued from previous page)

Lubet & Czackes, *supra*, at 195, citing Jenkins & Rubin, *New Vunerabilities and the Acquisition of New Weapons by Non-government Groups,"* in Evans & Murphy, *Legal Aspects of International Terrorism*, 221 (1978).

[51] See Hannay, *supra*, note 9.

in 1976 and 1977, the "OC" or Office of Command with responsibility for the Active Service Unites was a command center in name only. (RT: 82-83). "[T]oo many people . . . were taking too many things onto their shoulders and they hadn't got it sufficiently structured," at least in 1971. (RT: 85-86). In this instance the Irish tradition of physical force works against the accused. Targets such as Madame Tussaud's and the infamous Birmingham Pub, attributed to the PIRA, can only tangentially be considered "economic targets" if the purpose of the campaign was to destroy the artificial economy in *Northern Ireland.* (RT: 90-91).[52]

The lack of control or consideration of the political effectiveness of any given action is further demonstrated by the fact that many "no warning bombs" were set despite the PIRA policy against such actions. (RT: 91-94, 299). The selection of targets could not even be explained by the accused's expert on the PIRA. (RT: 99-102). Such incidents as described herein, with the concommitant destruction of militarily irrelevant property and persons might be excusable in the full-scale war scenario where such mindless destruction is truly incidental to actions in furtherance of political objectives, but the politically irrelevant property and persons cannot themselves be property [sic] found to be in furtherance of the objectives, especially in a case such as this where it appears the conduct was against the rules set by the uprising group itself, and has

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52 See footnote 50, *supra.*

been repeatedly recognized as unsuccessful. (RT: 306-08).[53]

The response of the British government does not turn what are otherwise non-protected acts into political offenses. As noted in the Diplock Report, the type of offender does not reduce the danger to society. The same response would have been necessary whether a political goal was involved or not. Moreover, the character of the action must be judged at the time it was committed, and it cannot be validated by later actions.

Based upon the foregoing, it is the opinion of this Court that the accused cannot claim the benefit of the political offense exception. This latter finding concludes the action insofar as this Court is concerned, and all that remains now is for this Court to certify to the Secretary of State that the accused may be extradited in conformance with the requirements of United States law and the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland.

Dated this 28th day of September, 1982, in San Francisco, California.

/s/ F. STEELE LANGFORD
United States Magistrate

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[53] This Court's inability to find proof of direction by authorities within the PIRA distinguishes the instant case from *McMullen, supra,* Mag. Op. at 5-6.

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No. 86-9

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM JOSEPH QUINN, PETITIONER

v.

GLEN E. ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review in concluding that the "political uprising" in Northern Ireland did not extend to England.

2. Whether crimes of violence against civilians that occur in England are extraditable when they are allegedly committed by persons seeking to change the form of government in Northern Ireland.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 61-164) is reported at 783 F.2d 776. The opinions of the district court (Pet. App. 16-60) and the magistrate who conducted the extradition hearing (Pet. App. 165-262) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1986. A petition for rehearing was

denied on April 22, 1986. The petition for a writ of certiorari was filed on July 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a request by the United Kingdom for the extradition of petitioner, who is charged with a number of offenses allegedly committed in England. After holding a hearing, the magistrate found petitioner extraditable (Pet. App. 165-262). On a writ of habeas corpus, the district court overturned the magistrate's decision and found that petitioner was not extraditable because his offenses fell within the "political offense" exception in the 1977 extradition treaty between the United States and the United Kingdom (*id.* at 16-60). The court of appeals reversed in part and remanded in part (*id.* at 61-164). It found petitioner extraditable on one charge against him, and it remanded a second charge to the district court for further proceedings.

1. In October 1981, the government of the United Kingdom charged petitioner, a United States citizen, with a series of offenses allegedly committed in England. The charges included murdering a police constable, conspiring to cause explosions in the United Kingdom, and six substantive counts involving explosive devices. Pet. App. 16-17, 65. At the time the charges were brought, petitioner was residing in this country.

Petitioner was arrested on September 30, 1981, on a provisional warrant issued on an application by the United States on behalf of the United Kingdom (Pet. App. 17). On November 4, 1981, the United Kingdom made a formal diplomatic request for petitioner's extradition under the 1977 extradition treaty

between the United States and the United Kingdom (28 U.S.T. 229, T.I.A.S. No. 8468).

2. The magistrate conducted an extradition hearing under 18 U.S.C. 3184 on the United Kingdom's request to extradite petitioner on the murder and conspiracy charges (Pet. App. 1-2).[1] The evidence introduced at the extradition hearing showed that petitioner engaged in a conspiracy to cause explosions between January 1, 1974, and April 3, 1975.[2] Petitioner's co-conspirators are known as the "Balcombe Street Four" after the location of the flat where they were arrested in December 1975, following a six-day siege. *Id.* at 69. The conspiracy evidence focused on a series of bombing incidents in 1974 and 1975, three of which involved letter bombs and three of which involved bombs planted in public places. Two of the letter bombs caused injury to civilians. Petitioner's fingerprints were found on the wrapping around each of the three bombs. *Id.* at 66-67. Petitioner's fingerprints were also found on one of the bombs that was planted in a public place, and the fingerprints of several of petitioner's co-conspirators were found on one of the other bombs (*id.* at 67). Each of those bombs was defused without causing injury.

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[1] Prior to the hearing, the United Kingdom withdrew its extradition request on the six substantive counts involving explosives (Pet. App. 17).

[2] On April 4, 1975, petitioner was arrested in Ireland in connection with separate 1974 kidnapping and assault charges. He was subsequently convicted in Ireland of membership in an outlawed organization, the Provisional Irish Republican Army. He was imprisoned on that charge until January 2, 1976, when he was released. Pet. App. 66.

The murder with which petitioner is charged occurred on February 26, 1975. On that date, a police constable stopped petitioner on a London street because of petitioner's suspicious behavior. When petitioner ran from the first officer, two other officers began pursuing him. One of the officers, Police Constable Stephen Tibble, placed himself in petitioner's path and prepared to stop him. Petitioner then drew a pistol, shot Constable Tibble three times, and continued running. Tibble died that afternoon. Pet. App. 68, 175.

Subsequent police searches of several London flats and houses, including the Balcombe Street flat, revealed explosives, detonators, fuses, and diagrams of bomb construction (Pet. App. 67-68, 177, 193-198). The items found in the flats connected those bomb factories with each other and with the various bombings. Petitioner's fingerprints were found on items in all of the residences, and the automatic pistol that was used to kill the constable was found in the Balcombe Street flat. *Id.* at 69, 179-180, 194.

Following the evidentiary hearing, the magistrate certified to the Secretary of State that petitioner was extraditable on the charges of murder and conspiracy to cause explosions (Pet. App. 17, 262). The magistrate concluded that there was probable cause to believe that petitioner had murdered Constable Tibble (*id.* at 212-217) and that petitioner was a member of and participant in the bombing conspiracy.[3] The

[3] The magistrate concluded that petitioner's extradition on the conspiracy charge was not barred by the statute of limitations, because the running of the statute of limitations was tolled by petitioner's flight (Pet. App. 217-230). The statute of limitations did not affect the murder charge, because neither the United Kingdom nor the United States recognizes a statute of limitations for murder (*id.* at 217).

magistrate rejected petitioner's claim that extradition should be barred on the ground that his offenses were exempted by the provision of the 1977 treaty dealing with political offenses (*id.* at 230-262). At the time of the offenses, the magistrate found, there existed in Northern Ireland a violent political uprising of sufficient magnitude to implicate the political offense exception (*id.* at 236-248). The magistrate found, however, that petitioner had failed to prove either that he was a member of the uprising group (*id.* at 248-251) or that his offenses were incidental to and in furtherance of that political uprising (*id.* at 251-262). Accordingly, the magistrate found that the political offense exception was not applicable to petitioner's crimes.

2. Petitioner sought review of the magistrate's certification in the district court by way of habeas corpus, and the district court granted the writ. The district court held that petitioner could not be extradited on either the murder or the conspiracy charge because those crimes constituted political offenses within the meaning of the 1977 treaty. The district court ruled that it was unnecessary for petitioner to show, as the magistrate had required, that he was a member of the uprising group in order to invoke the exception. Pet. App. 30-36. The district court also concluded that the murder and the bombing conspiracy were incidental to and in furtherance of the uprising (*id.* at 36-60).

3. The court of appeals reversed in part and remanded in part, with each member of the panel writing separately. Judge Reinhardt concluded that the charges under which the United Kingdom requested extradition do not fall within the political offense ex-

ception in the 1977 treaty[4] (Pet. App. 84-127). In his view, the political offense doctrine would be triggered if an uprising existed and if the offense with which the defendant was charged were incidental to the uprising. (*id.* at 107-118). In this case, Judge Reinhardt observed, the magistrate was correct in finding that an uprising existed in Northern Ireland, but Judge Reinhardt concluded that the uprising did not extend to England, because the level of violence there was insufficient in itself to constitute an "uprising" (*id.* at 124-125). Moreover, he found that there was no uprising in England because "what violence there was was not being generated by citizens of England" (*id.* at 125). In the absence of such an uprising in the place where the crimes were committed, Judge Reinhardt concluded that neither the Tibble murder nor the bombing conspiracy fell within the political offense exception to the 1977 treaty (*id.* at 127). With respect to the statute of limitations on the bombing conspiracy, Judge Reinhardt concluded that that part of the case had to be remanded to the district court for further development of two issues: (1) whether that charge was initiated against petitioner within the five-year limitations period for conspiracy that is recognized under American law; and (2) whether petitioner's alleged fugitive status tolled the statute of limitations for all or some of the period between the 1975 offense and the 1981 extradition request. *Id.* at 131-133.

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[4] Like the magistrate and the district court, all members of the court of appeals panel rejected the government's argument that the question whether an offense falls within the political offense exception is a matter committed to the exclusive jurisdiction of the Executive Branch. Pet. App. 26-28, 73-80, 135 n.*, 149, 231-232.

Judge Duniway concurred in the judgment that petitioner's offenses do not fall within the treaty's political offense exception, but he did not concur in Judge Reinhardt's analysis (Pet. App. 149). In particular, Judge Duniway rejected Judge Reinhardt's geographical limitation on the existence of an uprising; he preferred instead the rationale of the decision in *Abu Eain* v. *Wilkes*, 641 F.2d 504, 521 (7th Cir.), cert. denied, 454 U.S. 894 (1981), where the Seventh Circuit held that the political offense doctrine does not apply to "the indiscriminate bombing of the civilian population" (Pet. App. 150). In addition, Judge Duniway concluded that neither the Tibble murder nor the bombing conspiracy was incidental to any uprising. He pointed out that none of the individuals to whom the letter bombs were sent had any direct connection to the troubles in Northern Ireland, and he concluded that the fact that Tibble was a police officer did not convert his murder into a political offense, since petitioner killed the officer simply in an effort to avoid arrest. *Id.* at 151. Judge Duniway concurred in the portion of Judge Reinhardt's opinion remanding the bombing conspiracy charge to the district court for further findings (*ibid.*).

Judge Fletcher dissented. She disagreed with Judge Reinhardt's conclusion that the uprising in Northern Ireland did not extend to England (Pet. App. 152-153). She also concluded that petitioner's offenses were incidental to that uprising (*id.* at 153-154). However, she took the position that the political offense exception does not apply to foreign mercenaries. Because the record did not show the extent of petitioner's ties to Northern Ireland, Judge Fletcher would have remanded the case to the district court for factual findings about whether petitioner, an

American citizen, "should be treated as an Irish national and afforded the protection of the political offense exception" (*id.* at 156).

Although none of the three judges agreed on the analysis that should be employed in this case, the court's judgment was that petitioner was extraditable on the murder charge, while the bombing conspiracy charge had to be remanded to the district court for further proceedings.

ARGUMENT

1. Apart from the merits of the claims in the petition, there are two important reasons that this case does not warrant review by this Court.

a. First, the status of the "political offense" exception in the 1977 extradition treaty has recently undergone wholesale revision as a result of the ratification of a new extradition treaty between the United States and the United Kingdom. On June 25, 1985, the two countries signed a supplementary extradition treaty, S. Exec. Rep. 99-17, 99th Cong., 2d Sess. 2 (1986). On July 17, 1986, the Senate consented to ratification of the supplementary treaty, which will enter into force after the treaty partners exchange instruments of ratification. Supplementary Treaty, Art. 7, S. Exec. Rep. 99-17, at 17.

The supplementary treaty was negotiated after three federal district courts had denied requests by the United Kingdom for the extradition of members of the Provisional Irish Republican Army accused or convicted of acts of violence. Each of those requests was denied on the ground that the offenses were political and therefore not extraditable under Article V(1)(c) of the 1977 treaty. S. Exec. Rep. 99-17, at 2; see Pet. App. 6. The new treaty is, accord-

ingly, designed to exclude terrorist acts from the category of "political offenses." To that end, the new treaty has removed from the reach of the "political offense" exception certain offenses, such as murder, voluntary manslaughter, kidnapping, and hostage-taking, as well as offenses involving the use of bombs or incendiary devices in a manner that endangers any person. Supplementary Treaty, Art. 1, S. Exec. Rep. 99-17, at 15.[5]

These changes in the scope of the "political offense" exception will dramatically alter the manner in which extradition cases such as this one will be handled in the future. In any future bombing or murder cases such as this one arising under the extradition treaties between the United States and the United Kingdom, there will be no need for the courts to explore the scope of the "political offense" exception, since that exception has been declared inapplicable to such offenses. Thus, the questions that petitioner asks this Court to review are not likely to arise in any future cases involving extradition requests by the United Kingdom resulting from politically motivated crimes of violence.

b. The second general reason that this is an inappropriate case for review by this Court is that no two members of the panel were able to agree on the

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[5] While eliminating the "political offense" exception for certain crimes, the supplementary treaty provides that extradition shall not occur if the subject of the extradition request establishes that the request for extradition "has been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions." Supplementary Treaty, Art. 3, S. Exec. Rep. 99-17, at 16.

proper interpretation of the "political offense" exception in the 1977 treaty. The panel's three-way split therefore did not make law that is binding even in the Ninth Circuit. Judge Reinhardt's analysis would make the political offense exception inapplicable to crimes committed in locations other than the one in which the "uprising" is taking place. Judge Duniway's analysis would make the political offense exception inapplicable to the bombing of members of the civilian population. Judge Fletcher would find the political offense doctrine applicable to offenses occurring outside Northern Ireland, but she would not extend the doctrine to persons without "tangible and substantial connections with the country in which an uprising occurs." Pet. App. 155. Because the panel was unable to agree on a single rationale for the decision in this case, there is no conflict between the analysis in this case and the analysis of the political offense doctrine by any other court of appeals, or even any district court.

2. a. With regard to the particular issues petitioner raises in this Court, he first claims (Pet. 8-12) that the court of appeals improperly applied a de novo standard of review to the question whether an uprising existed in England. Petitioner claims that on that question the court of appeals should have deferred to the factual findings of the magistrate and the district court.

The first answer to this contention is that it was not the court of appeals that committed this asserted error; the error, if any, was committed only by Judge Reinhardt. Because neither Judge Duniway nor Judge Fletcher found the geographical issue relevant to their analysis, they did not find it necessary to

decide whether there was an "uprising" in England for purposes of the political offense exception.

Moreover, petitioner has erred in his characterization of Judge Reinhardt's opinion. Judge Reinhardt did not override any finding of fact by the magistrate; instead, he expressly deferred to the magistrate on questions of fact (Pet. App. 81-82). Judge Reinhardt then noted that the magistrate had found (1) that there was a violent political uprising in Northern Ireland at the time of petitioner's offenses; and (2) that if his inquiry were limited to London, he would find that the severity of the political disturbance there was insufficiently grave to bring into play the political offense exception (*id.* at 119). Judge Reinhardt agreed with both of those factual findings by the magistrate. Where he parted company with the magistrate was on the magistrate's "legal determination" that because Northern Ireland and London are both part of the United Kingdom, and because offenses in both areas were directed at the same sovereign, the political uprising in Northern Ireland had to be regarded as extending to London. *Ibid.* Judge Reinhardt therefore did not disregard the general principle that the magistrate's findings of fact should be given substantial deference in extradition proceedings. It was the magistrate's legal conclusion from those facts with which Judge Reinhardt disagreed, and that legal conclusion was subject to plenary review on appeal.

Contrary to petitioner's suggestion (Pet. 9-10), Judge Reinhardt's review of the magistrate's findings is not at odds with the Seventh Circuit's decision in *Abu Eain* v. *Wilkes*, 641 F.2d 504, 508 (7th Cir.), cert. denied, 454 U.S. 894 (1981), the only court of appeals' decision that petitioner claims is in

conflict with the decision below. Like Judge Reinhardt, the court in *Abu Eain* concluded that the "existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not." 641 F.2d at 514. Both the *Abu Eain* court and Judge Reinhardt relied upon the magistrate's findings regarding the location and extent of political activity at the relevant times. Both then used those facts to arrive at a legal conclusion regarding whether the existence of such political activity in a particular location was sufficient to invoke the "political offense" doctrine. Thus, the method of approach in the two cases was the same.[6]

b. Petitioner also challenges (Pet. 13-15) Judge Reinhardt's analysis of the political offense exception, and he requests (*id.* at 15-16) that the Court take this occasion to conduct a general review of the political offense exception in the British treaty and others.

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[6] Petitioner suggests that the decision below is contrary to this Court's decision in *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896). In fact, however, the two decisions are entirely consistent. In *Ornelas*, as in this case, the magistrate found that the political offense doctrine did not apply, because the offenses at issue were not of a political character. There, as here, the district court disagreed with the magistrate and granted the writ of habeas corpus. This Court reversed the district court, holding that the magistrate's findings were supported by evidence and thus had to be upheld. *Id.* at 511-512. The court of appeals in this case likewise upheld the magistrate's findings and his conclusion that the political offense doctrine did not apply to this case, even though the judges on the court of appeals reached that conclusion on differing legal grounds. In fact, a strict application of *Ornelas* would have required the court of appeals to affirm the magistrate's ruling that petitioner was extraditable on both charges, since there was evidence supporting the magistrate's ruling. *Ibid.*

As we have noted, the divergent approaches taken by the three members of the panel in this case do not commit the Ninth Circuit to any single view on the proper construction of the political offense exception. Moreover, the ratification of the new supplementary treaty renders the Ninth Circuit's struggles with the political offense doctrine largely academic, at least for purposes of future extradition requests by the United Kingdom. For that reason, any inconsistency between the judgment in this case and the results in the three other cases in which the United Kingdom has sought extradition of IRA members or associates is not likely to have any continuing effect.[7]

On the merits, we believe that the question whether a particular offense is "one of a political character" within the meaning of Article V of the 1977 extradition treaty is a matter that should be committed to the Secretary of State and should not be addressed by the courts in the course of extradition litigation. Courts of law are ill-equipped to address the sensitive and difficult questions of international politics

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[7] In any event, it is not clear that the application of the political offense exception has yielded the inconsistent results that petitioner claims (Pet. 16). Two of the three cases he cites, *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981), appeal dismissed, 668 F.2d 122, 124 (2d Cir. 1981), and *In re Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984), involved the murder or attempted murder and wounding of British soldiers in Northern Ireland. Those cases therefore do not present the issue of the geographical limitation on the scope of the "political uprising" that is presented by Judge Reinhardt's analysis. The third case, *In re McMullen*, No. 3-78-1899 (N.D. Cal. May 11, 1979), involved the bombing of a military barr ks in England. Because that attack, unlike the attack in this case, was not directed at the general public or civilian police, the magistrate found that the offenses were "incidental to" the uprising in Northern Ireland.

that are raised by the political offense doctrine; absent a treaty provision requiring that the matter be left to the courts, we submit that the Secretary of State should resolve the political offense issue as part of his decision whether to file an application for extradition in the first place.

If the political offense exception is to be the subject of litigation, however, we believe that Judge Duniway's analysis was the best among the three approaches taken by the members of the panel in this case. Agreeing with the view taken by the Seventh Circuit in the *Abu Eain* case, Judge Duniway properly concluded that the political offense exception should be applied " 'with great care lest our country become a social jungle and an encouragement to terrorists everywhere' " (Pet. App. 150, quoting *Abu Eain*, 641 F.2d at 520). Other courts have followed the same cautious approach: there does not appear to be a single appellate court precedent—certainly petitioner cites none—in which extradition has been refused because of the political offense doctrine.[8] The paucity of authority for the application of the doctrine is hardly surprising. Our courts routinely give short shrift to claims of "political necessity" for criminal conduct in our own country (see *United States* v. *Allen*, 760 F.2d 447 (2d Cir. 1985); *United States* v. *Dorrell*, 758 F.2d 427 (9th Cir. 1985);

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[8] In 1957, the Ninth Circuit invoked the political offense doctrine in refusing to extradite an alleged war criminal to Yugoslavia. *Karadzole* v. *Artukovic*, 247 F.2d 198. This Court, however, vacated the judgment in that case, 355 U.S. 393 (1958), and as Judge Reinhardt observed in this case (Pet. App. 95), *Karadzole* is "one of the most roundly criticized cases in the history of American extradition jurisprudence."

United States v. *Perl*, 584 F.2d 1316, 1322-1323 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979); *United States* v. *Moylan*, 417 F.2d 1002, 1008-1009 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970)); the courts are properly reluctant to recognize similar claims by persons who have committed crimes of violence in other countries.

Judge Duniway was also correct in concluding that the bombing conspiracy and murder charges were insufficiently related to the "political uprising" in Northern Ireland to fall within the political offense exception. For that reason, he concluded, petitioner failed to satisfy the requirement that the charged offenses be "incidental to" the uprising. The murder of Constable Tibble, in particular, had nothing whatsoever to do with the troubles in Northern Ireland, other than that petitioner may have been concerned that if he were stopped and questioned by the police on a London street, his terrorist activities might be discovered. Judge Duniway's analysis of that issue accords with that of the Seventh Circuit in *Abu Eain*, the only other court of appeals case to address the point. Like Judge Duniway, the *Abu Eain* court concluded that the political offense exception does not apply to "the indiscriminate bombing of the civilian population." *Abu Eain*, 641 F.2d at 520; see Pet. App. 150.

Even if Judge Duniway's position is incorrect, that would not aid petitioner in this case. Whatever lack of clarity there may be about the general scope of the political offense exception under the 1977 treaty between the United States and the United Kingdom, as well as under other similarly worded treaties, the exception clearly does not apply to someone in petitioner's position. Petitioner's case involves crimes of

violence committed (1) by a citizen of a country uninvolved in the political struggle; (2) against civilians unconnected with the struggle; and (3) in a location far from the scene of the alleged uprising. Each of the three judges on the panel in this case agreed that one or more of these points could be enough to remove the case from the "political offense" category, and to our knowledge no court has ever held the political offense exception applicable to such a case. For that reason, this would be an inappropriate candidate for review, even if there were a pressing need to have this Court address the contours of the political offense exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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